(30,628)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 178

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PETITIONER,

vs.

THE A. F. THOMPSON MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 17, 1925

[fol. 1] **IN SUPREME COURT OF APPEALS OF WEST VIRGINIA, CHARLESTON**

CAPTION

No. 4996

A. F. THOMPSON MANUFACTURING COMPANY, a Corporation, Plaintiff Below, Defendant in Error,

vs.

CHESAPEAKE & OHIO RAILWAY CO., a Corporation, Defendant Below, Plaintiff in Error

Writ of Error and Supersedeas Granted August 17, 1923, from Judgment Rendered June 6, 1923

IN CIRCUIT COURT OF CABELL COUNTY

PETITION FOR WRIT OF ERROR—Filed Aug. 11, 1923

[fol. 2] To the Honorable the Judges of the Supreme Court of Appeals of West Virginia:

Your petitioner, the Chesapeake & Ohio Railway Company, a corporation, respectfully represents unto your Honors that it is aggrieved by a final judgment of the Circuit Court of Cabell County, West Virginia, rendered on the 6th day of June, 1923, in a certain action at law then and therein pending, wherein your petitioner was defendant and A. F. Thompson Manufacturing Company, a corporation, was plaintiff.

A duly certified copy of the record in said case is filed herewith, from which it appears that this court has jurisdiction, and your petitioner prays that said record may be taken and read as a part of this petition.

Your petitioner represents that the aforesaid judgment of the Circuit Court of Cabell County is erroneous, and that the same should be reviewed and reversed by this Honorable Court, because of various and sundry errors committed by the Circuit Court of Cabell County at the hearing of this case, during the trial thereof to the prejudice of your petitioner.

Statement

This is an action in assumpsit, brought by A. F. Thompson Manufacturing Company, a corporation, against The Chesapeake & Ohio Railway Company, a corporation, in the Circuit Court of Cabell County, West Virginia, to April Rules, 1921. The case was first tried on September 16, 1921, at which time the plaintiff took a nonsuit. The case was then re-instated, an amended declaration filed

and on February 10, 1922, the case was again tried, resulting in a verdict and judgment for the plaintiff for $3,519.12. To this judgment the defendant prosecuted a writ of error to the Supreme Court of Appeals of West Virginia, and on January 30, 1923, the Supreme [fol. 3] Court by its opinion and order reversed the judgment of the Circuit Court of Cabell County and remanded the case for a new trial. It was again tried on June 6th, 1923, before a jury under a plea of the general issue, resulting in a verdict for the plaintiff for $4,264.50, upon which the court entered judgment on the 6th day of June, 1923.

Facts

It will appear from the record that the A. F. Thompson Manufacturing Company, plaintiff, was engaged in the business of manufacturing sheet metal stoves at its plant in the City of Huntington, West Virginia. In the early part of June of that year it ordered from the Chesapeake & Ohio Railway Company at Huntington two standard box type freight cars for the purpose of shipping a consignment of stoves manufactured by it. Pursuant to this order two cars of the kind specified were furnished by the Railway Company. Into them the Thompson Company loaded seventeen hundred sheet metal stoves, about twenty per cent of which were packed in paste board cartons, sealed with gummed paper and the remainder wrapped in heavy paper and enclosed in ordinary open packing crates.

On June 9, 1920, the Railway Company issued a standard bill of lading for each of the two cars, the doors were sealed and the cars were consigned to the Richards & Conover Hardware Company at Kansas City, Missouri.

Upon their arrival at Kansas City several days later the cars were found to be in the same excellent condition as when they left Huntington, the original seals were unbroken, yet upon receipt of the shipment by the consignee seven hundred and seventy-eight of the stoves were so hopelessly rusted that they were unsaleable. The other nine hundred and ninety-two were accepted and paid for by the consignee. It was the contention of the plaintiff that the defendant was liable under its common law duty as insurer of freight entrusted to it for transportation. There was no attempt made to show that the [fol. 4] loss was occasioned by any active negligence on the part of the carrier.

Your petitioner assigns the following material errors committed by the trial court to its prejudice:

(1) The court erred in improperly admitting certain evidence on behalf of the plaintiff over the objection of the defendant to the prejudice of the defendant.

(2) The court erred in refusing to admit certain evidence offered by the defendant and objected to by the plaintiff.

(3) The court erred in giving to the jury plaintiff's instructions marked respectively, "Court's Instruction" and "No. 2" over the objection of the defendant.

(4) The court erred in refusing to give to the jury defendant's instructions Nos. 1 and 4, offered by the defendant, and objected to by the plaintiff.

(5) The court erred in refusing to strike out the evidence of the plaintiff on motion of the defendant and to direct a verdict for the jury, because the evidence does not show that claim in writing was filed within the time prescribed by the interstate bills of lading, under which the stoves in question moved.

(6) The court erred in refusing to set aside the verdict of the jury, because the same is contrary to law and the evidence, and because the evilence did not show that claim in writing was filed as required by the interstate bills of lading, under which the stoves in question moved, and for other reasons than assigned.

(7) For other errors apparent upon the face of the record.

Your petitioner, therefore, because of the errors aforesaid and others committed by the Circuit Court of Cabell County to the preju- [fol. 5] dice of your petitioner, prays that a writ of error and supersedeas may be awarded it to the judgment of the Circuit Court of Cabell County, and that upon a hearing in this case by this Honorable Court that the judgment aforesaid may be reversed, annulled and set aside, and that this court may enter such judgment as the Circuit Court of Cabell County should have entered, and your petitioner will ever pray.

Chesapeake & Ohio Railway Company, a Corporation, by C. W. Strickling, of Counsel. C. W. Strickling, Fitzpatrick, Brown & Davis, Attorneys.

STATE OF WEST VIRGINIA,
County of Cabell, ss:

I, C. W. Strickling, an attorney practicing in the Supreme Court of Appeals of West Virginia, do certify that I have examined the record in the case of A. F. Thompson Manufacturing Company, a corporation, against The Chesapeake & Ohio Railway Company, a corporation, and that in my opinion there is error in the said record, for which the judgment complained of in the foregoing petition should be reviewed and reversed.

Given under my hand this 10th day of August, 1923.

C. W. Strickling.

IN CIRCUIT COURT OF CABELL COUNTY

CLERK'S CERTIFICATE

I, George R. Seamonds, Clerk of the Circuit Court of Cabell County, do hereby certify that the above named petitioner has this day filed a copy of the foregoing petition in my office, and I do further certify that said petitioner has also executed and delivered to

me a proper bond conditioned according to law in the penalty of [fol. 6] double the amount estimated by him as necessary to defray the expenses of transmitting the original papers herein to the Clerk of the Supreme Court of Appeals of West Virginia, for arranging and indexing the record, and for preparing the transcript thereof in case the writ of error and supersedeas prayed for in the foregoing petition is granted.

I do further certify that I herewith transmit all of the original papers in this case to the Clerk of the Supreme Court of Appeals of this state.

Given under my hand and the seal of said court this 10th day of August, 1923.

G. R. Seamonds, Clerk. (Seal.)

Writ of error and supersedeas awarded Aug. 17, 1923, bond $4,600.
Frank Lively, a Judge of the Supreme Court of Appeals.

To Wm. B. Mathews, Clerk, Charleston, W. Va.

[File endorsement omitted.]

[fol. 7] IN CIRCUIT COURT OF CABELL COUNTY

SUMMONS AND SHERIFF'S RETURN

The State of West Virgisia, to the Sheriff of Cabell County, Greetings:

We command you that you summon Chesapeake & Ohio Railway Co. a Corpo. if it be found in your bailiwick to appear before the judge of our Circuit Court of Cabell County of rules to be held in the Clerk's office of said Court, on the First Monday in April, 1923 to answer A. F. Thompson Manufacturing Co. a Corporation of a plea of Assumpsit, Damages $5,000.00, and have then there this writ.

Witness G. R. Seamonds, Clerk of our said Circuit Court, of Cabell County, at the Court House thereof, of the 12th day of March, 1921, and in the 58 year of the State.

G. R. Seamonds, Clerk of Cabell County Circuit Court, West Virginia, by —— ——, Deputy.

On Back

Executed the within summons by delivering a true copy thereof to Jos. Newman, Station Agent for the Chesapeake & Ohio Railway Co. a Corpo. at its principal place of business in Cabell County, West Virgina. He the said Newman being a resident of said county and in the actual employment of said corporation, the President, Treasurer, Cashier or other chief officer not found in my bailiwick this 14th day of March, 1921.

W. A. Williams, Sheriff, by M. M. Bevans, Deputy.

[fol. 8] IN CIRCUIT COURT OF CABELL COUNTY

DECLARATION—Filed April 4, 1921

A. F. Thompson Manufacturing Company, a corporation, complains of the Chesapeake and Ohio Railway Company, a corporation, or a plea of trespass on the case in assumpsit; for this, to-wit, that heretofore, to-wit on the 9th day of June, 1920, Anno Domini, the said defendant was a common carrier of goods and chattels for hire in and by certain trains of railway cars, etc., from a certain place, to-wit, from the City of Huntington, West Virginia, to a certain other place, to-wit, to the City of Cincinnati, Ohio, and the said defendant, being such carrier as aforesaid, the said plaintiff heretofore, to-wit, on the day and year first aforesaid, at the special instance and request of the said defendant, caused to be delivered to the said defendant, so being such carrier as aforesaid, certain goods and chattels, to-wit, One Thousand Seven Hundred (1,700) gas stoves made of metallic substance and other elements of the said plaintiff of great value to-wit, of the value of Five Thousand Dollars ($5,000.00) to be taken care of and safely and securely carried and conveyed by the said defendant as such common carrier as aforesaid, in and by the said train of railway cars, etc., from Huntington, West Virginia, afore-[fol. 9] said, to Cincinnati, Ohio, aforesaid, and there, to-wit, at Cincinnati, Ohio, the place last mentioned, to be safely and securely delivered by the said defendant for the said plaintiff to another common carrier on the route to the City of Kansas City, in the State of Missouri, the destination of said shipment of stoves, as provided in the Bills of Lading issued therefor; and in consideration thereof, and of certain reward to the said defendant in that behalf, it, the said defendant, being such common carrier as aforesaid, then, to-wit on the day and year first aforesaid, undertook, and faithfully promised the said plaintiff, to take care of the said goods and chattels, and safely and securely to carry and convey the same in and by the said train of railway cars, etc., from Huntington, West Virginia, aforesaid, to Kansas City, Missouri, aforesaid, and there, to-wit, at Kansas City, Missouri, the place last mentioned, safely and securely to be delivered the same for the said plaintiff. And although the said defendant as such carrier aforesaid, then had and received the said goods and chattels for the purpose aforesaid, yet the defendant, not regarding its duty as such carrier, nor its said promise and undertaking so made as aforesaid, but contriving and intending to deceive and injure the said plaintiff in this behalf, hath not taken care of the said goods and chattels, or safely carried or conveyed the same from Huntington, West Virginia, to Kansas City, Missouri, aforesaid, nor that there, to-wit, at Kansas City, Missouri, the last named place, safely or securely delivered the same for the said plaintiff, but on the contrary thereof, it, the said defendant, being such common carrier as aforesaid, so carelessly and negligently behaved, and conducted itself with respect to the said goods and chattels, that by and through the mere carelessness, negligence and improper conduct of the said defendant and its servants and employees in this

behalf, the said goods and chattels, being of the value aforesaid, afterwards, to-wit, on the day and year aforesaid, became and were wholly lost to the said plaintiff.

And for this also, to-wit, that the said defendant heretofore, to-
[fol. 10] wit, on the 9th day of June, in the year 1920, Anno Domini, in consideration that it, at its own special instance and request, then had the care and custody of divers other goods and chattels of the said plaintiff, of the like number, quantity, quality, description and value as those in the first count of this declaration mentioned, it, the said defendant, undertook and then and there faithfully promised the said plaintiff to take due and proper care thereof, whilst the said defendant so had the care and custody of the same, yet the said defendant, not regarding its said promise and undertaking, but contriving and intending to injure and deceive the said plaintiff in this behalf, whilst the said defendant so had the care and custody of the said goods and chattels, took so little and such bad and improper care thereof, that the same afterwards, to-wit, on the day and year aforesaid, became and were greatly damaged and injured and wholly lost to the said plaintiff.

Nevertheless, the said defendant, not regarding its said several promises and undertakings, hath not kept, performed or fulfilled the same, although often requested to do so, but hath broken the same as aforesaid, to the damage of the said plaintiff of Five Thousand Dollars ($5,000.00). And therefore it brings its suit.

Simms & Staker, P. Q.

[File endorsement omitted.]

IN CIRCUIT COURT OF CABELL COUNTY

AMENDED DECLARATION—Filed Sept 27, 1921

[fol. 11] A. F. Thompson Manufacturing Company, a corporation, complains of the Chesapeake and Ohio Railway Company, a corporation, of a plea of trespass on the case in assumpsit, for this, to-wit, that heretofore, to-wit, on the 9th day of June, 1920, Anno Domini, the said defendant was a common carrier of goods and chattels for hire in and by certain trains of railway cars, etc., from a certain place, to-wit, from the City of Huntington, West Virginia, to a certain other place, to-wit, to the City of Cincinnati, Ohio. And the said defendant, being such carrier as aforesaid, the said plaintiff heretofore, to-wit, on the day and year first aforesaid at the special instance and request of the said defendant, caused to be delivered to the said defendant, so being such carrier as aforesaid, certain goods and chattels, to-wit, One Thousand Seven Hundred (1,700) gas stoves made of metallic substances and other elements of the said plaintiff of great value, to-wit, of the value of Five Thousand Dollars, ($5,000.00) to be taken care of and safely and securely carried and conveyed by the said defendant as such common carrier as aforesaid, in and by the said train of railway cars, etc. from Huntington, West Virginia,

aforesaid, to Cincinnati, Ohio, aforesaid, and there, to-wit, at Cincinnati, Ohio, the place last mentioned, to be safely and securely delivered by the said defendant for the said plaintiff to another common carrier on the route to the City of Kansas City, in the State of Missouri, the destination of said shipment of stoves, as provided in the Bills of Lading issued therefor; and in consideration thereof, and of certain reward to the said defendant in that behalf, it, the said defendant, being such common carrier as aforesaid, then, to-wit, on the day and year first aforesaid, undertook, and faithfully promised the said plaintiff to take care of the said goods and chattels, and safely and securely to carry and convey the same in and by said train of railway cars, etc., from Huntington, West Virginia, aforesaid to Kansas City, Missouri, aforesaid, and there, to-wit, at Kansas City, Missouri, the place last mentioned, safely and securely to deliver the same for the said plaintiff. And although the said defendant, [fol. 12] as such common carrier aforesaid, then had and received the said goods and chattels for the purpose aforesaid, yet the defendant, not regarding its duty as such carrier, nor its said promise and undertaking so made as aforesaid, but contriving and intending to deceive and injure the said plaintiff in this behalf, hath not taken care of the said goods and chattels, or safely carried or conveyed the same from Huntington, West Virginia, to Kansas City, Missouri, aforesaid, nor hath there, to-wit, at Kansas City, Missouri, the last named place, safely or securely delivered the same for the said plaintiff, but on the contrary thereof, it, the said defendant, being such common carrier as aforesaid, so carelessly and negligently behaved, and conducted itself with respect to the said goods and chattels, that by and through the mere carelessness, negligence, and improper conduct of the said defendant and its servants and employees in this behalf, the said goods and chattels, being of the value aforesaid, afterwards, to-wit, on the day and year aforesaid, became and were wholly lost to the said plaintiff.

And, for this also, to-wit, that the said defendant, heretofore, to-wit, on the 9th day of June, in the year 1920, Anno Domini, in consideration that it, at its own special instance and request, then had the care and custody of divers other goods and chattels of the said plaintiff, of the like number, quantity, quality, description, and value as those in the first count of this declaration mentioned, it, the said defendant, undertook and then and there faithfully promised the said plaintiff to take due and proper care thereof, whilst the said defendant so had the care and custody of the same, yet the said defendant, not regarding its said promise and undertaking, but contriving and intending to injure and deceive the said plaintiff in this behalf, whilst the said defendant so had the care and custody of the said goods and chattels, took so little and such bad and improper care thereof, that the same afterwards, to-wit, on the day and year aforesaid, became and were greatly damaged and injured and wholly lost to the said plaintiff.

And for this also, to-wit, that the said defendant heretofore, [fol. 13] to-wit, on the 9th day of June, 1920, Anno Domini, was a common carrier of goods and chattels for hire in and by said train

of railway cars, etc., from a certain place, to-wit, from the City of Huntington, West Virginia, to a certain other place, to-wit, to the City of Cincinnati, Ohio, and the said defendant being such common carrier as aforesaid, the said plaintiff heretofore to-wit, on the day and year first aforesaid at the special instance and request of the said defendant caused to be delivered to the said defendant, so being such carrier as aforesaid, said goods and chattels to-wit, One Thousand Seven Hundred, (1,700) gas stoves made of metallic substances and other elements belonging to and owned by the plaintiff, of great value, to-wit, of the value of Five Thousand Dollars ($5,000.00) to be taken care of and safely and securely carried and conveyed by said defendant as such common carrier as aforesaid in and by the said train of railway cars, etc., from Huntington, West Virginia, to Cincinnati, Ohio, as aforesaid, and there, to-wit, at Cincinnati, Ohio, the place last mentioned, to be safely and securely delivered by the said defendant for the said plaintiff to another common carrier on the route to the city of Kansas City, in the state of Missouri, the destination of said shipment of stoves as provided in the Bills of Lading issued therefor and delivered to the plaintiff herein on the date aforesaid. And in consideration thereof, and of certain reward to the said defendant paid by the plaintiff in that behalf, it, the said defendant, being such common carrier as aforesaid, then, to-wit, on the day and year first aforesaid, undertook and faithfully promised the said plaintiff to take care of the said goods and chattels and safely and securely, and in a reasonble time, and without delay to carry and convey the same in and by the said train of railway cars, etc., from Huntington, West Virginia, aforesaid, to Kansas City, Missouri, aforesaid, and there, to-wit, at Kansas City, Missouri, the place last mentioned, safely and securely to deliver the same for the said plaintiff. And although the said defendant as such carrier aforesaid, then [fol. 14] and there had received the said goods and chattels for the purpose aforesaid, yet the defendant not regarding its duty as such carrier, nor its said promise and undertaking so made as aforesaid, and contriving and intending to deceive and injure the said plaintiff in this behalf hath not taken care of the said goods and chattels, or safely carried or conveyed the same from Huntington, West Virginia, to Kansas City, Missouri, aforesaid, nor hath there, to-wit, at Kansas City, Missouri, the place last mentioned, safely or securely delivered the same for the said plaintiff, but on the contrary thereof, it, the said defendant, being such common carrier as aforesaid, so carelessly and negligently behaved and conducted itself, with respect to the said goods and chattels, that by and through the mere carelessness, negligence and improper conduct of the said defendant and its servants and employees in this behalf, and said defendant did take an unusual and unreasonable time for the transportation of said goods and chattels, and did delay the delivery thereof for the said plaintiff, as aforesaid, for an unusual and unreasonable time longer than is usually required for shipments between Huntington, West Virginia, and Kansas City, Missouri, and did unlawfully and negligently and unreasonable delay the delivery of said goods and chattels for the said plaintiff at Kansas City, Missouri,

aforesaid, and the said goods and chattels being of the value aforesaid. Afterwards, to-wit, on the day and year aforesaid, became and were wholly lost to the said plaintiff, and said plaintiff avers that it caused notice in writing for the loss and damage to said goods and chattels to be made to the Chicago Rock Island and Pacific Railroad at Kansas City, Missouri, which was the point of delivery of said shipment within four months after the delivery of said shipment which said claim for damages was rejected and refused by the said Chicago Rock Island and Pacific Railroad Company, and which claim for damages has also been refused by the defendant herein. Plaintiff further alleges that the following is a statement of the dam-
[fol. 15] ages occasioned to it to the shipment of goods and chattels hereinbefore mentioned:

First to the damages on two cars of gas heating stoves shipped to the Richards & Canover Hardware Company, Kansas City, Missouri, by the A. F. Thompson Manufacturing Company on June 9th, 1920, as per Bills of Lading issued therefor by the Chesapeake and Ohio Railway Company, defendant herein.

To bill of stoves as per Richard & Canover invoice to the C. C. I. Ry. Co. attached here	$3,700.80
To stoves as per Richards & Canover Hardware Co. of January 27th, attached here	281.00
To freight on car returning stoves here as per C. & O. paid expense bill 3635 attached here	165.62
To one car freight paid to Kansas City, Mo., as per bills attached here	113.71
To expense going to Kansas City, Mo. as follows:	
Railroad fare and Pullman berth	71.06
Meals and Hotel bill	23.60
To oils and cloths and brushes for cleaning stoves sold at Kansas City, Mo	11.45
To interest to January 1, 1922	525.26
	$4,892.50
Loss salvage of stoves returned after expense of getting in as good shape as we could	628.00
Amount due	$4,264.50

And the plaintiff further alleges that all of the gas stoves shipped, as set out above, were refused and rejected by the Richards and Can-
[fol. 16] over Hardware Company, and were received back by the said plaintiff, and have ever since been, and are now the property of, and blonging to said plaintiff. Nevertheless, the defendant, not regarding its several promises and undertakings, hath not kept, performed or fulfilled the same, although often requested so to do, but hath broken the same as aforesaid; to the damage of the said plaintiff of Five Thousand Dollars and therefore it brings its suit.

Simms and Staker, P. Q.

Defendant will take notice that the plaintiff will rely upon the attached account as a statement of its damages herein and will introduce proof of the same at the trial.

[File endorsement omitted.]

IN CIRCUIT COURT OF CABELL COUNTY

In Assumpsit

THE A. F. THOMPSON MANUFACTURING COMPANY

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation

Defendant's Bill of Exceptions No. 1

CAPTION

Carbon copy of Proceedings had and testimony taken before the Honorable Thos. R. Shepherd, Judge of the Circuit Court of Cabell County, West Virginia, and a jury at the May term, 1923.

Austin M. Sikes, Official Reporter. Phones 631-3758, Huntington, W. Va.

[fol. 17] THE A. F. THOMPSON MANUFACTURING COMPANY, a Corporation, Plaintiff,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, Defendant

Damages: ——.

Pending in the Circuit Court of Cabell County, West Virginia

Proceedings Had and Testimony Taken Before the Honorable Thos. R. Shepherd, Judge of the Circuit Court of Cabell County, West Virginia, and a Jury at the May term, 1923.

Appearances: Henry Simms, Esq., Counsel for Plaintiff Company; C. N. Davis, Esq., C. W. Strickling, Esq., of counsel for Railway Company; Austin M. Sikes, Official Reporter.

Defendant's Bill of Exceptions No. 1

Be it remembered that upon the trial of this case, after the jury had been first duly sworn to try the issues joined between the plain-

tiff and the defendant, the plaintiff, The A. F. Thompson Manufacturing company, a corporation, to maintain the issue upon its part, introduced before the Court and jury the following witnesses, who testified as follows:

A. F. THOMPSON, being first duly sworn, testified as follows:

Examination by Attorney Henry Simms:

[fol. 18] Q. Will you give your name to the jury, please?
A. A. F. Thompson.
Q. Do you hold any position with the plaintiff in this case, the A. F. Thompson Manufacturing company?
A. I am pretty near the whole thing. I am President and owner of it, except a few shares which I issued to my children. It is a close corporation.
Q. Where is your plant now located?
A. We are located at 216 and 218 8th avenue, in a two story brick building.
Q. Huntington, West Virginia?
A. Yes, sir.
Q. What does the company manufacture?
A. We manufacture gas stoves.
Q. How long have you been manufacturing gas stoves?
A. I have been manufacturing gas stoves in this particular plant——

(Counsel interrupts the witness.)

Q. I mean all told, Mr. Thompson?
A. Oh! I have been manufacturing gas stoves for sixteen years, but I have been dealing in them for thirty years.
Q. Will you give an estimate, an approximate estimate of the number of gas stoves that you have manufactured since you have been running a factory?
A. Well, I would just have to make a rough guess at that, something in excess of two hundred thousand gas stoves.
Q. Out of what materials have you been manufacturing these stoves?
A. Sheet metal and some little cast iron, most of them with the asbestos backs.
Q. Your company has sued the Chesapeake & Ohio Railway company in this case for damages for stoves shipped; will you tell when you shipped,—when the plaintiff company shipped the stoves complained of in this case?
A. I would rather have the bill of lading in order to give you that date correctly. I think it was June 9th, but I am not absolutely [fol. 19] certain.
Q. In order to refresh your memory look at these papers?

(Counsel hands Mr. Thompson several papers.)

A. Yes. Well, on June, 9th, we shipped Richards & Conover Hardware Company of Kansas City, Missouri, P. M. car No. 80272,

billed as one minimum car, weight 16,000 pounds containing 800 gas stoves crated.

Q. What year?

A. 1920.

Q. Proceed with your answer?

A. And on June 9th, 1920, we shipped Richards & Conover Hardware company, P. M. Car No. 81296, containing 900 gas stoves, crated, shipped as a minimum car, we-ght 16,000 pounds. They were smaller stoves and one hundred more in the car.

Q. Mr. Thompson, do you know where the freight depot of the Chesapeake & Ohio Railway Company is located here in this city?

A. Yes, sir.

Q. Where is it situated?

A. Situated on Second avenue, extending from about 7th street to 9th street.

Q. Have you made shipments of any kind over the Chesapeake & Ohio Railway company before this one?

By Mr. Strickling: We object because it is immaterial.

(Objection overruled, to which ruling of the court, the defendant, by counsel, excepted.)

A. Yes, sir.

By Mr. Simms:

Q. How long had you been shipping over the Chesapeake & Ohio Railway company?

By Mr. Strickling: Quest-on objected to as ommaterial.

(Objection overruled, to which ruling of the court, the defendant, by counsel, excepted.)

A. I have been shipping as my individual company, I would [fol. 20] say about twenty-two years.

By Mr. Simms:

Q. What was the manner in which you delivered the goods to the railway company, and what papers were given you, how was it done?

By Mr. Strickling: Question objected to as immaterial.

(Objection overruled, to which ruling of the court, the defendant, by counsel, excepted.)

A. Always on standard bills of lading, standard form of bills of lading, one original copy and two duplicates. We usually mail one copy to our customer and retain the orginal in our files as a receipt for the goods which have been shipped.

By Mr. Strickling: We object to this answer and move to exclude same from the record.

(Motion to strike, overruled, to which ruling of the court, the defendant, by counsel, excepted.)

By Mr. Simms:

Q. What person would act in behalf of the Chesapeake and Ohio Railway company in giving you the bills of lading for the shipments?

By Mr. Strickling: Let the record show our objection.

(Objection overruled, to which ruling of the court, the defendant, by counsel, excepted.)

A. I don't get that question?

By Mr. Simms:

Q. What person acts on behalf of the Chesapeake and Ohio Railway company, in issuing you or giving you the bills of lading for shipments?

By Mr. Strickling: We again object to the question.

(Objection overruled, to which ruling of the court, the defendant, by counsel, excepted.)

[fol. 21] A. It would be hard to give you the names of the different persons and agents acting on behalf of the Chesapeake & Ohio Railway company, who have heretofore signed the bills of lading. Mr. Armstrong has acted on behalf of the Chesapeake & Ohio Railway company for the last several years.

By Mr. Simms:

Q. Who is Mr. Armstrong?
A. General Agent of the Chesapeake & Ohio Railway company.
Q. What is his name?
A. G. L. Armstrong.
Q. Where is his office?
A. On the second floor of the freight house, here in the city of Huntington.
Q. Do you know him personally?
A. Yes, sir.
Q. Have you ever paid him for any shipments of freight over the Chesapeake & Ohio Railway company?

By Mr. Strickling: We object to the question as immaterial.

(Objection sustained, to which ruling of the court, the defendant, by counsel, excepted.)

By Mr. Simms:

Q. You know he is the general agent of the Chesapeake & Ohio Railway Company, here in the City of Huntington?

A. I know it; yes, sir.

Q. Tell how you shipped the goods in this particular case, Mr. Thompson?

A. Just the same as we usually do, that is, by having the cars set on the siding and having Mr. Reese to inspect the cars, my son and myself inspected them also, then we loaded the cars from our factory and wareroom, and when the cars were loaded, I called up Mr. Armstrong to send a representative to inspect the cars, if he so desired. He told me over the telephone it was not necessary but [fol. 22] go ahead and seal the ca- as we usually did. I sealed the cars by borrowing seals from the Carolina Pine Lumber company. That notation on the bill of lading, you will find they are shipped as a minimum car lot, and sealed with C. P. L. Company's seals, being the initials of the Carolina Pine Lumber company.

Q. Mr. Thompson, did you personally see that these cars were loaded and that the gas stoves were loaded in these two cars?

A. I did; yes, sir.

Q. Did you receive any papers from the railway company showing that you had shipped these goods?

A. I received a bill of lading.

Q. Will you look at these papers and say what they are?

(Counsel hands Mr. Thompson two bills of lading.)

A. These are the standard form of bills of lading, signed by G. L. Armstrong, General Agent of the Chesapeake & Ohio Railway company, by Mr. Hite, the rate clerk at that time.

Q. Is G. L. Armstrong, who signed those two bills of lading, is he the general agent of the Chesapeake & Ohio Railway company?

A. Yes, sir, he is the general agent.

Q. He is the same man that you have been talking about in your testimony?

A. Yes, sir, the same man.

Q. You stated that you received these two bills of lading from Mr. Hite?

A. Yes, he was the rate clerk at the freight station at that time.

Q. He was in the employ of the Chesapeake & Ohio Railway company, and in Mr. Armstrong's office?

A. Yes, sir, he is the rate clerk or was the rate clerk at that time. I don't know where he is now.

Q. He was in the employ of the Chesapeake & Ohio Railway company at that time?

A. Yes, sir, he is the gentleman who made me a rate of 69¢ on [fol. 23] the shipment.

Q. We want to introduce these bills of lading in evidence.

By Mr. Strickling: We object to the introduction of these two bills of lading, because they have not been properly identified.

By the Court:

Q. Do I understand you to say that these are the receipts delivered to you by the railway company for the stoves that you shipped?
A. Yes, sir.

(Objection overruled, to which ruling of the court, the defendant, by counsel, excepted.)

By Mr. Simms:

Q. Will you read the front of the bill, not the contract on the back, the front of the bill, showing the number of gas stoves shipped and the route, read all of that to the jury, Mr. Thompson?
Q. There was some change made in routing from my original routing. I made out the bills of lading, C. & O. to Cincinnati, B. & O. to St. Louis——

(Counsel interrupts the witness.)

By Mr. Strickling: We object to this statement, because the bills of lading speak for themselves.

(Objection sustained, to which ruling of the court, the plaintiff, by counsel, excepted.)

By Mr. Simms: We now offer in evidence, your Honor, the two bills of lading.
By Mr. Strickling: We object to their introduction, because they have not been properly identified.

(Objection to the introduction of the two bills of lading overruled, to which ruling of the court, the defendant, by counsel, excepted.)

By Mr. Simms:

[fol. 24] Q. I will ask you, Mr. Thompson, to read the bills of lading, as they are there.

A. (Thereupon Mr. Thompson read to the jury as follows:

Counsel for the plaintiff company offered in evidence and read to the court and jury, the bill of lading, identified by A. F. Thompson, dated Huntington, West Virginia, June 9, 1920, in the words and figures as follows, and for identification is marked

PLAINTIFF'S EXHIBIT No. 1

Bill of Lading

For use in connection with the standard form of straight bill of lading approved by the Interstate Commerce Commission by Order No. 787, of June 27, 1903.

United States Railroad Administration

W. G. McAdoo, Director General of Railroads

Chesapeake and Ohio Railroad

Straight Bill of Lading—Original—Not Negotiable

Shipper's No. —. Agent's No. —.

Received, subject to classifications and tariffs in effect on the date of issue of this original bill of lading, at Huntington, W. Va., June 9, 1920, from A. F. Thompson Mfg. Co., the property described below, in apparent good order, except as noted (contents and conditions of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its place of delivery at said destination, if on its road, otherwise, to deliver to another carroer on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time intersected in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including [fol. 25] conditions on back hereof) and which are agreed to by the shipper and accepted for himself.

The rate of freight from Huntington, W. Va., to Kansas City, Mo., 69¢ is in cents per 100 lbs.

Consigned to Richards & Conover Hardware Co.

Destination: Kansas City, Mo.

Route: C., &c. B/c. Rec. at East St. Louis. Car initial: ——. 8 p. m.

Car. No. 80272.

No. Packages: 1.

Description of articles and special marks: M — Cov —, containing 800 gas stoves crated. Weight: 16,000.

Shipper's name: A. F. Thompson Mfg. Co., Per A. F. T.

Stamped on the face of the bill of lading in the words and figures as follows: C., R. I. & P. Ry. 671,864. Loss and damage cla-. C., R. I. & P. Ry. Station claim. 59,787. Kansas City, Mo. Shipper's load and count: —. G. R. Armstrong, Gen. Agt., per R. M.

The conditions found on the back of bill of lading are in the words and figures as follows:

Conditions

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto [fol. 26] except as hereinafter provided. No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God—the public enemy quarantine, the authority of law or the act of de-

fault of the shipper or owner or by—for differences in the weights of grain seed or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occur-ing after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence hall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occur-ing while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request or resulting from a defect or vice in the property or from riots and strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (Except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through rout-s, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this [fol. 27] bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable despatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price to the consignee, including the freight charges, if prepaid). At the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariff upon which the rate is based in any of which events such lower value shall be the maximum amount to govern such compensation whether or not such loss or damage occurs from negligence.

Claims for loss, damage or delay must be made in writing to the

carrier at the point of delivery or at the point of origin within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on acount of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and bailing at owner's cost. Each carrier over whose route cotton is to be [fol. 28] transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator may (unless otherwise expressly noted herein, and, then if not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be at the option of the carrier removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or shortage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent, shall be entirely at risk of owner after unloaded from cars or vessel or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the [fol. 29] cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property may be carried by water over any part of such route, such water carriage shall be performed subject to such liabilities, limitations, and exemptions provided by statute and to conditions contained in this bill of lading not inconsistent with such statutes of this section, and subject also to the conditions that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances, or from collision, stranding or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to sell at intermediate ports, to tow and be towed, and assist vessels in distress and to deviate for the purpose of saving life or property.

If the property is being carried under a tariff which provides that [fol. 30] any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the provisions of the tariff, which shall be treated as incorporated into the conditions of this bill of lading.

Sec. 10. Any alteration addition or erasure in this bill of lading which shakk be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Thereupon, counsel for the plaintiff company offered in evidence and read to the Court and jury, the bill of lading, identified by A. F. Thompson, in the words and figures as follows, and for identification is marked

PLAINTIFF'S EXHIBIT No. 2

Bill of Lading

For use in connection with the standard form of straight bill of lading approved by the Interstate Commerce Commission by Order No. 787, of June 27, 1903.

United States Railroad Administration

W. G. McAdoo, Director General of Railroads

Chesapeake and Ohio Railroad

Straight Bill of Lading—Original—Not Negotiable

Shipper's No. —. Agent's No. —.

Received, subject to classification and tariffs in effect on the date of this original bill of lading at Huntington, West Virginia, June 9, 1920, from —— ——, the property below described, in apparent good order, except as noted (contents and conditions of contents of [fol. 31] packages unknown), marked consigned and destined as indicated below, which said company agrees to carry to its place of delivery at said destination, if on its road, otherwise, to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The rate of Freight from Huntington to Kansas City, Mo., 69¢, is in cents per 100 lbs. Special 69.

Consigned to Richards & Conover Hardware Co.

Destination: Kansas City, Mo.

Route: B. *oh* Cotton belt at East St. Louis.

Car Initial: P. M.

Car No.: 81296.

No. packages: 900.

Description of articles and special marks: Gas Stoves crated and sealed with C. P. L. Co. *Ceal.* Shipped as M— Car.

Weight: 16,000.

Shipper: A. F. Thompson Mfg. Co., per A. F. T.

Stamped on the face of bill of lading *is in* the words and figures as follows: C., R. I. & P. Ry. 6,718,644. Loss and damage claim. C., R. I. & P. Ry. Station claim. 59787. Kansas City, Mo. Ship- [fol. 32] per's load and count: —. G. R. Armstrong, Gen. Agt., per R. H.

The Conditions found on the back of bill of lading are in the words and figures as follows:

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damages thereto except as hereinafter provided. No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God—the public enemy quarantine, the authority of law or the act of default of the shipper or owner, or for difference in the weights of grain, seed or other commodities caused by natural shrinkage or

discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours, (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession) and the burden to prove freedom from such negligence—shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request or resulting form a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars,) shall be liable only for negligence, and the burden to prove freedom from [fol. 33] such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over it own lines, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable despatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from rail to water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of landing, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classifications or tariff upon which the route is based in any of which events such lower value shall be the maximun amount to govern such computation whether or not such loss or damage occurs from negligence.

Claims for loss, damage or delay must be made in writing to the

carrier at the point of delivery or at the point of origin within four months after delivery of the property or in case of failue to make [fol. 34] delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and bailing at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator may (unless otherwise expressly noted herein, and, then if it not promptly unloaded be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays after notice of its arrival has been duly sent or given may be kept in car, or depot, or place of delivery of the carrier or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be the option of the carrier removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storgge.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held [fol. 35] Forty-eight hours exclusive of legal holidays, for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent, shall be entirely at the risk of owner after unloaded from cars or vessel or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any article of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are endorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods without previous full written disclosure to the carrier of their nature, shall — for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property and if required shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon *thr* articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property may be carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent w-th such statutes or this section, [fol. 36] and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lake, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress and to deviate for the purpose of saving life or property.

If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the provisions of the tariff, which shall be treated as incorporated into the conditions of this bill of lading.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

By Mr. Strickling: We now move to exclude from the records the two bills of lading just offered in evidence by the plaintiff, and read to the jury.

(Motion to exclude, overruled, to which ruling of the court, the defendant, by counsel, excepted.)

By Mr. Simms:

Q. How many stoves were delivered to the railway company on this shipment, on that date?

A. Seventeen (1700) hundred, eight (800) hundred in one car and nine (900) hundred in the other.

Q. What kind of stoves were they?

A. They were known as sheet metal stoves, with asbestos backs, [fol. 37] including nickel plate corners and feet and some nickel plate finish.

Q. Will you tell the jury the method of packing the stoves which you shipped on these two bills of lading?

A. I have two stoves here in the county clerk's office. If you will permit my son to go down and get them, I will show you just exactly how they are packed.

Q. We will come to that in a moment, Mr. Thompson; just tell the court and jury your method of packing the stoves which you shipped on these two bills of lading offered in evidence?

A. The stoves are nestled together, in this manner, one standing up-right, with the top of the stove standing in this manner, and the other stove standing up side down, both stoves turned face to face; they are nestled together with the face of the stove turned toward each other; in other words, with their faces together, being practically enclosed as far as the inner part of the stoves, leaving the outward part of the stoves exposed, with paper wrapped around them, two stoves to each package.

By Mr. Strickling: Now at this point I want to object to the stoves, the two stoves that Mr. Thompson refers to, being brought into court and insist on my objection, on the ground that it has been now practically two years since this shipment of stoves was made to the Richards & Conover Hardware company of Kansas City, which would, in my opinion, to some extent, change the condition of the stoves. And I want to further *objection* to the introduction of these two stoves to the jury, on the ground that Mr. Thompson was not at Kansas City, when these stoves arrived there and did not arrive there until some six weeks later, and he does not know of his own knowledge whether the stoves are anything like the same condition as they were in when received from the consignee.

By the Court: I will withhold my ruling until later, Mr. Strickling.

[fol. 38] By Mr. Simms:

Q. Mr. Thompson, are these two stoves from that shipment of stoves,—are these two stoves picked out from that shipment of stoves?

A. These stoves are now in the new styled sack that we use. This is the way we ship our stoves now, but that is not the way the ones in question were shipped. At that time we had to wrap them in paper. You will notice that this is a sack, a paper sack, and we slip the sack over the stoves, just in this manner. There is a company now that manufactures these sacks and you just pull the sack down over the stove, in this manner, (illustrating, by pulling the sack over top of one of the stoves). This is a much quicker way than wrapping by hand.

Q. You may now show the jury the two stoves that you have there?

By Mr. Strickling: I object to these stoves being opened up here before the jury, until it has been shown that these stoves are a part of the same shipment, made in June, 1920, and that the stoves are in the same condition now, as they were when received at Kansas City.

By the Court: I will pass on your objection later.

By Mr. Simms:

Q. You may first tell the jury, Mr. Thompson, how the stoves in question were packed, for shipment?

A. The stoves are nestled together, in this form, (illustrating) the faces resting together, so as to completely enclose the asbestos, in that way, (illustrating, by showing the jury how the stoves are packed). Then they are crated but they were wrapped in paper, completely enclosed. This sack does not cover the bottom of the stove, as you will notice, but the paper that we wrapped the stoves in that we shipped, covered the stoves all over, and then they were tied [fol. 39] with a string, wrapped just like this, (illustrating) and crated for shipment.

By Mr. Simms:

Q. Did you tie them together?

A. They were tied together, like that (illustrating, by tying two stoves together) and set in a crate.

Q. What kind of a crate did you have, a crate with slats to it?

A. A wooden crate, with slats to it.

Q. Now I want to here offer in evidence to the jury, the stoves, to show and demonstrate to the jury the condition of the stoves.

By Mr. Strickling: We again renew our objection to the introduction of these two stoves, for reasons heretofore assigned.

(Objection sustained, for the present. To which ruling of the court the plaintiff, by counsel, excepted.)

By Mr. Simms:

Q. What stoves are those, Mr. Thompson?

A. Those are the two stoves formerly exhibited in the court room in the previous trial of this case.

By Mr. Strickling: We object to the statement of the witness and move to exclude same.

(Objection and motion to exclude overruled, to which ruling of the court the defendant, by counsel, excepted.)

By Mr. Simms:

Q. Now are these the two, or are these two of the stoves that were shipped in these two cars on the 9th day of June, 1920?

By Mr. Strickling: We object to the question as to form and substance.

(Objection sustained, because the question is leading. To which ruling of the court the plaintiff company, by counsel, excepted.)

By Mr. Simms:

[fol. 40] Q. What two stoves are these?

A. These are two of the stoves returned to us from the Richards & Conover Hardware company, as being damaged in transit, Mr. Simms.

By Mr. Strickling: We object to that statement and move to strike same from the record.

(Motion to exclude overruled, to which ruling of the court the *plaintiff*, by counsel, excepted.)

By Mr. Simms:

Q. Will you state whether or not these are two of the stoves returned from Richards & Conover Hardware company, or by the Richards & Conover Hardware company to you of your shipment to them, which they returned to you?

By Mr. Strickling: Question objected to.

(Objection overruled, to which ruling of the court the defendant, by counsel, excepted.)

A. Yes, sir, these are two of the stoves returned to me from my shipment to Richards & Conover Hardware company:

By Mr. Simms:

Q. You mean they are two of the stoves that were shipped by you under the bills of lading in this case?

A. Yes, sir.

Q. What condition were these stoves in when they were shipped by you to Richards and Conover Hardware company, Mr. Thompson?

A. They were in strictly first class condition.

Q. Now what condition were all the stoves in that were shipped in these two cars in question in this case?

A. They were all in as good condition as we ever shipped stoves.

Q. Was there anything on them at all that ought not to be on them?

[fol. 41] By Mr. Strickling: We object to the question as leading.

(Objection sustained, to which ruling of the court the plaintiff company, by counsel, excepted.)

By Mr. Simms:

Q. State whether or not there was any rust on these stoves when they were shipped by you.

By Mr. Strickling: We object to this question as leading.

(Objection overruled, to which ruling of the court the defendant, by counsel, excepted.)

A. The stoves were in first class condition when we shipped them.

By Mr. Strickling: We object to the question and answer and move to exclude them from the record.

(Motion to exclude overruled, to which ruling of the court the defendant, by counsel, excepted.)

By Mr. Simms:

Q. How long was it before you heard from the stoves, that anything had happened to them, after you shipped them?

By Mr. Strickling: We object to this question.

(Objection overruled, to which ruling of the court the defendant, by counsel, excepted.)

A. I haven't the exact date but I would say about—a little more than three weeks, probably four weeks, as the stoves were on the road twenty (21) one days before they got there.

By one of the jurors: May I ask a question?
By the Court: Certainly.

By one of the jurors:

Q. Were these people you were shipp*ed-* to regular customers of yours, or was this the first order of this kind of stoves?
A. Yes, it was the first kind of stoves that they had received [fol. 42] from us, but we shipped them other stoves.

By Mr. Simms:

Q. Will you tell whether anything was done that would injure the stoves, in the nature of covering the stoves or packing them?
A. No, when the asbestos is applied to the stoves, there is always a covering put over it of paper to prevent it from dropping loose.
Q. Were all of these stoves packed in that way?
A. All packed in that way; yes, sir.
Q. Where was the asbestos on these stoves?
A. On the burner back, practically back of the burner, along here as you see on this stove. (Mr. Thompson refers to one of the stoves in the court room.)

Q. Of what material were these stoves made?
A. Sheet metal.
Q. Of what did the corners consist?
A. The corners were stamped nickel plate; nickel plate corner and sheet metal also.
Q. Did you take any steps to investigate about these stoves after you got information about them?

By Mr. Strickling: Question objected to.

(Objection overruled, to which ruling of the court the defendant, by counsel, excepted.)

A. When Richards & Conover Hardware company wrote me that the stoves——

(The court interrupts the witness.)

By the Court: Don't tell what they wrote you; tell what you did then.

By Mr. Simms:

Q. Yes, what did you do then?
A. I wrote them they were mistaken about their complaint and I went to Kansas City to investigate the complaint. When I got to Kansas City and went to the General Traffic Association, I forget the name of the gentleman who waited on me, but there are a num-
[fol. 43] ber of railroads coming into Kansas City and they constitute certain traffic bureaus, the Western Traffic Bureau, and others. and I went to the Western Traffic Bureau and they sent a representative with me over to Richards & Conover store. We uncrated some of the stoves and this fellow when he *say* what condition the stoves were in, declined to make a notation as to what——

(Counsel interrupts Mr. Thompson.)

By Mr. Strickling: We object to the witness making that statement, as to what the fellow declined to do.

(Objection overruled, to which ruling of the court the defendant, by counsel excepted.)

By Mr. Simms:

Q. Proceed with your statement, Mr. Thompson?
A. He declined to make a statement on the expense bill of the damaged condition of the stoves, which was absolutely essential for me to file a claim or for anybody else to file a claim with the railroad company.

By Mr. Strickling: We object to that statement and move to exclude same from the record.

(Motion to exclude the latter part of the answer of the witness, "which was absolutely essential for me to file a claim or for anybody

else to file a claim with the railway company" is stricken from the record. To which ruling of the court, the plaintiff company, by counsel, excepted.)

By Mr. Simms:

Q. You may continue with your statement?
A. The first traffic man declined to act and wanted to leave it to another man, higher up.

By Mr. Strickling: We object to that statement and move to exclude it from the record.

(Motion to exclude sustained, to which ruling of the court the plaintiff, by counsel, excepted.

By Mr. Simms:

[fol. 44] Q. What did you do when you got there in reference to these stoves?
A. That is absolutely what I did, what I am trying to tell you. I made three trips before I could get a man who would finally take the authority to sign up anything.
Q. Did you go and see Richards & Conover?
A. Yes, sir.
Q. What did they do then about it, and what did you do, Mr. Thompson?
A. What did they do?
Q. Yes, and what did you do?
A. Do you want me to tell you what I told them?
Q. Yes, tell what you told them?

By Mr. Strickling: We object to any conversation between the witness and Richards & Conover.

(Objection sustained, to which ruling of the court the defendant, by counsel, excepted.)

By Mr. Simms:

Q. Did you see these stoves?
A. I saw the stoves.
Q. You may tell what you did, the first thing you did? Did you find the stoves there?
A. I found the stoves there.
Q. Where were the stoves?
A. They were on the second or third floor, I forget just which floor of the Richards & Conover wholesale house.
Q. Is that in Kansas City, Missouri?
A. Yes, in Kansas City, Mo.
Q. Now tell the jury how they were stacked in the warehouse or in the store, and what condition they were in, and what you did?
A. I uncrated some of the stoves from different piles in the ricks

or stacks where the stoves were stacked, to see the condition they [fol. 45] were in. I found the stoves in the crates, more or less damaged, just about fifty-fifty of the stoves damaged, some not damaged at all and some practically worthless. I saw two cartons broken open. Some of these stoves were shipped in cartons and I saw two of the cartons broken open and saw there was no rust on the feet of the stoves, or no rust whatever about the stoves that were shipped in cartons. I immediately got a tall ladder, had the gentlemen bring me a tall ladder and I got up near the top of the stacks of stoves, because the cartons had been placed near the top of the store room, and I took out some of the cartons from near the top, as well as near the middle and different places along where they were stacked, and I had these cartons opened, to find out what condition the stoves were in. I found on opening the cartons that the stoves were absolutely not rusted at all. I had quite a few of the cartons opened and those that I saw opened and those that were opened by others, there was no rust whatever on the stoves; they were not damaged at all, but the ones that were crated, they were rusted. They were the same kind of stoves, made out of the same material, as those shipped in the cartons, but the stoves that were crated would run just about fifty-fifty of the stoves damaged; half would be good and half would not be. Those that were exposed on the outside of the cars, were the ones that were damaged or rusted worst.

By Mr. Strickling:

Q. We move to strike out that statement because Mr. Thompson was not in Kansas City when the shipment was received and he was not in position to know what condition the stoves were in, when they were received at Kansas City, and did not know what condition existed as to the stoves until afterwards.

(Motion to exclude overruled, to which ruling of the court the defendant, by counsel, excepted.)

A. Witness continues: I never would have gone there, Mr. Strickling, had they paid me for my stoves.

By Mr. Simms:

[fol. 46] Q. Now how many of these stoves were accepted by the Richards & Conover Hardware company as good stoves?

A. I would have to get the bills to tell exactly. I think seven hundred (700) were returned, though I am not certain about that. (Counsel hands Mr. Thompson a paper.)

Q. Just merely to refresh you memory only, look at that paper there and see if that refreshes your memory?

Q. There were 922 stoves in first class condition and they returned 778. They paid me for 922 stoves, as being in first class condition. They returned 778.

By Mr. Strickling: We object to that question and answer and move to strike it from the record, for the same reason as heretofore assigned, that Mr. Thompson was not there at the delivery of the stoves and he does not know the condition of the stoves when they were received at Kansas City.

(Motion to exclude overruled, to which ruling of the court the defendant, by counsel, excepted.)

By Mr. Simms:

Q. Mr. Thompson, were these stoves all one kind or were they various kind-?

A. They were all the same style stoves, all built in the same way, from the same material, by the same factory and in the same week.

Q. I do not understand exactly a part of your answer, I would like to have you make it clear, as to the difference, if any, that you found in the condition of the stoves where the paper carton was not bursted open and where it was all bursted open, if you found and such cartons?

By Mr. Strickling: Question objected to.

(Objection overruled, to which ruling of the court the defendant, by counsel, excepted.)

A. The stoves in the paper cartons on which the seals were not broken were in first class condition, there were three stoves that I recall distinctly that I saw the ends of the cartons broken open and [fol. 47] I pulled them out and looked at them and the ends of the stoves that the carton was broken on, was badly rusted, the ones that the carton was not broken open, the stove was not rusted at all. I opened some eleven or twelve of the sealed cartons and there was not one of them injured at all, that were sealed.

By Mr. Strickling: We object to the question and statement of the witness and move to exclude same from the record.

(Motion to exclude overruled, to which ruling of the court the defendant, by counsel, excepted.)

By Mr. Simms:

Q. I will ask you to state to the jury how many of these stoves were rusted to such an extent that they were refused by the Richards & Conover Hardware company?

By Mr. Strickling: We object to this question for reason heretofore assigned, that Mr. Thompson was not in Kansas City at the time of the delivery of the stoves and he did not know what condition the stoves were in when they were received.

(Objection overruled, to which ruling of the court the defendant, by counsel, excepted.)

A. How many they refused to pay for?

By Mr. Simms:

Q. Yes?

By the Court: He just answered it, but he may answer it again.

A. 778 is shown on their bill here, which they filed claim for with the Rock Island Railway company.

By Strickling: We object to the statement of the witness and move to exclude same from the record.

(Motion to exclude overruled, to which ruling of the court the defendant, by counsel, excepted.)

By Mr. Simms:

Q. Have you been paid for these 778 stoves?

[fol. 48] A. No, sir, I haven't been paid anything.

Q. You have not?

A. No, sir.

Q. What steps did you take, if any, concerning the disposing of these stoves after the 778 of them were returned, Mr. Thompson?

A. Well, I had to pay $150.00 to get all the stoves uncrated and the paper removed to see which were damaged and which stoves were not damaged. I made a contract with the employees of the store there, three of them, the shipping clerk and two other boys to have them uncrated, the entire uncrating of the 1700 stoves and re-crating the good ones, for which they charged me $150.00 and which I paid.

By Mr. Strickling: We object to that statement and move to strike same from the record upon the ground that the measure of damage is the difference in the market value and cost value at the time of delivery.

(Objection overruled, to which ruling of the court the defendant, by counsel, excepted.)

Witness continues:

A. That cost me $150.00.

By Mr. Strickling: We move to strike that statement for reasons heretofore assigned.

(Objection overruled, to which ruling of the court the defendant, by counsel, excepted.)

By Mr. Simms:

Q. That cost you how much?

A. $150.00.

By Mr. Strickling: To keep our record straight, we move to strike out the foregoing question and answer, for reasons heretofore assigned.

(Motion to strike, overruled, to which ruling of the court the defendant, by counsel, excepted.)

The witness continues:

A. Mr. Strickling, the railroad representative even O. K'd that claim.

[fol. 49] By Mr. Simms:

Q. Take this statement filed with the declaration, Mr. Thompson, and I will ask you to refresh your memory from it and give to the jury the items of your loss caused by the condition of the rusting of these stoves, and explain what the items are?

(Counsel hands Mr. Thompson the declaration filed in this case.)

By Mr. Strickling: We object to the question.
By the Court: As to what caused that condition, I will sustain that part of the answer, but he may answer the rest of the question.

(To which ruling of the court the defendant, by counsel, excepted.)

A. Why not just read the invoice?

By Mr. Simms:

Q. Go ahead and answer the question?
A.—

To *of* stoves as per Richards & Conover invoice, to the Chicago, Rock Island and Pacific Railway company, attached here	$3,700.80
To stoves as per Richards & Conover Hardware company of January 27th, attached here	281.00
To freight on car returning stoves here as per C. & O. paid expense bill 3635 attached here	165.62
To one car freight paid to Kansas City, Mo., as per bills attached here	113.71
To expense going to Kansas City, Mo., as follows: Railroad fare and Pullman birth	71.06
To meals and hotel bill	23.60
To oils and cloths and brushes for cleaning stoves, sold at Kansas City, Mo.	11.45
To interest to January 1, 1922	525.26
That makes a total of	$4,892.50
Less salvage of stoves returned after expense of getting in as good shape as we could	628.00
[fol. 50] That leaves a balance of	$4,264.50

By Mr. Strickling: We object to the foregoing question and the answer returned and move to strike same from the record.

(Motion to exclude overruled, to which ruling of the court the defendant, by counsel, excepted.)

By Mr. Simms:

Q. Why did the Richards & Conover Hardware company refuse these stoves?

By Mr. Strickling: Question objected to.

(Objection overruled, to which ruling of the court the defendant, by counsel, excepted.)

A. Because the stoves were rusted.

By Mr. Strickling: We move to strike the answer from the record.

(Motion to exclude overruled, to which ruling of the court the defendant, by counsel, excepted.)

By Mr. Simms:

Q. Now tell what you did, if anything, toward getting the stoves salvaged?

A. I first tried to sell the stoves in Kansas City, in the condition they were in to representatives of stove companies, but I couldn't do that. I tried to sell the damaged ones at any figure I could get for them, but we could not get an offer of any kind. I spent two days trying to sell them or get an offer for them in Kansas City. Then, when we found we could not salvage them at any price in Kansas City, the Rock Island representatives decided the only thing to do was to return the stoves here and sell them, which we did. In bringing or returning the stoves to Huntington we had additional freight to pay.

By Mr. Strickling: We object to the question and answer and [fol. 51] move to strike the statement from the record.

(Motion to exclude overruled, to which ruling of the court the defendant, by counsel, excepted.)

By Mr. Simms:

Q. When you got the stoves back to Huntington, the damaged stoves, what did you do with them then?

A. I sold them at different second hand men for whatever price I could get. A few of them I could get a fair profit on them and some of them I could not get over twenty five or fifty cents, and some we had to throw away altogether, we couldn't sell at any price.

Q. How long have you been in the stove business?

A. Selling and manufacturing both?

Q. Yes?

A. Thirty years, all my life.

Q. Will you tell the jury what market there is for second hand stoves, and if you would what can be obtained for them, compared with their original value?

By Mr. Strickling: Question objected to.

(Objection sustained, to which ruling of the court the plaintiff, by counsel, excepted.)

By Mr. Simms:

Q. Mr. Thompson, what sort of a warehouse did you find these stoves in, in Kansas City?

A. Large eight or ten story brick and steel constructed building, such as is used by hardware companies, in a good substantial building.

Q. What was the condition of the place where the stoves were, with reference to dampness or dryness?

A. Oh! it was a good, dry, first class warehouse.

Q. What amount did you finally get out of these damaged stoves as salvage?

A. $628.00.

Q. Was that what you sold them for, or was that the allowance made?

[fol. 52] A. That is what we sold them for and we credited it on the face of the invoice.

Q. Mr. Thompson, the item of $3,700.80 on your statement of damages, will you explain just what constitutes that?

A. $3,700.80?

Q. Yes?

A. To bill of stoves as per Richards & Conover invoice to the Chicago, Rock Island and Pacific Railway company, attached here $3,700.80. To stoves as per Richards and Conover Hardware Company of January 27th, attached here, $281.00

By Mr. Strickling: We object to the statement of the witness and move to strike same from the record.

(Motion to exclude overruled, to which ruling of the court the defendant, by counsel, excepted.)

By Mr. Simms:

Q. My question was, what did the item of $3,700.80 on your statement of damages consist of?

A. It consisted of 286 No. 14, black asbestos heaters, at $3.75 each, total $1,072.50; 192 No. 16 inch black asbestos heaters at $4.25, total $816.00; 150 18 inch black asbestos heaters at $4.75, total $712.50; 1 20-inch black asbestos heater at $5.25, total $5.25; 13 22-inch black asbestos heaters at $5.75 each, total $74.75; 100 14-inch nickel heaters at $5.00 each, total $500.00; 3 16-inch nickel heaters at $5.75 each, total $17.25; 33 22-inch nickel heaters at $8.75, total $288.75; to putting balance of these shipments in a

salable condition, $150.00; to freight charge on salvage #9246 C 69, $63.80. We paid this $150.00 to the men at Richards & Conover Hardware company to put these stoves in salable condition. The freight bill was $63.80. The total invoice of those items amount- to $3,700.80. Does that answer your question?

[fol. 53] By Mr. Strickling: We object to the statement of the witness and move to exclude same from the record.

(Motion to exclude overruled, to which ruling of the court the defendant, by counsel, excepted.)

By Mr. Simms:

Q. What I want to know is, what you would have received for the stoves and contract price to Richards & Conover Hardware company, which they agreed to pay you, if they had not been damaged?

A. I think that is itemized here, the $3,700.80 that I would have received for the stoves that were damaged and they declined to take.

Q. What is the second item of $281.00, Mr. Thompson?

A. Do you want to know what that consists of?

Q. Yes?

A. The $281.00 is for stoves as per Richards & Conover company, of January 27th.

By Mr. Strickling: We object to the question and answer and move to strike same from the record.

(Motion to exclude overruled, to which ruling of the court the defendant, by counsel, excepted.)

By Mr. Simms:

Q. Is that the amount you would also have received for these stoves according to the contract price?

A. The amount I would have received; yes, sir.

Q. And the $3,700.80 is the amount you would have received for the stoves that were damaged, according to the contract price of Richards & Conover Hardware company, and which they agreed to pay you if the stoves had not been damaged?

A. Yes, sir, that is the amount; those two amounts $281.00 and $3,700.80.

Q. Now, Mr. Thompson, when did the damaged stoves arrive back in Huntington?

A. I would have to again refer to those freight bills to ascertain that date.

[fol. 54] Q. There is the bill of lading and freight bill, showing when they were shipped back. Counsel hands Mr. Thompson two papers.)

A. (Witness examines the papers.)

Q. I simply wanted to know when it was? Refer to those papers to refresh your memory as to when they were shipped back, when did you leave Kansas City?

By Mr. Strickling: Question objected to, because there is no question as to the stoves shipped back here.

(Objection overruled, to which ruling of the court, the defendant, by counsel, excepted.)

A. A bill of lading shows that they were delivered to the railroad company on January 20, 1921.

By Mr. Simms:

Q. Look at that and say what it is?

(Counsel hands Mr. Thompson a statement.)

A. That is a statement of the Chicago, Rock Island and Pacific railway company at the time the stoves were shipped.

Q. When the stoves came back here did you select any of the stoves out of the bunch that were rusted?

A. Yes, sir.

Q. And did you keep them?

A. Yes, sir.

Q. Have you one of them here now?

A. I have two here.

Q. Where are they now?

A. Sitting over here in the court room.

Q. We want to offer these two stoves in evidence to the jury to show the condition they are in.

By Mr. Strickling: We object to the introduction of these two stoves, for reasons heretofore assigned.

By Mr. Simms: Before the court passes on the objection, I want to [fol. 55] ask the following question:

Q. Are they in the same condition now that they were in when you found them at Kansas City?

A. The only thing that has been removed is the paper, the wrapping that was on the stove, and with the exception of the paper wrapping being removed, they are in the same condition as when I found them at Kansas City. I put a paper sack on them to protect them and these two stoves have been setting in my office ever since the last trial. We had them here on the last trial and since then I have had them in the office at my factory ever since.

By Mr. Simms: We now offer these two stoves in evidence to show the jury the condition they were in when received at Kansas City.

By Mr. Strickling: We object to the introduction of these two stoves, for reasons heretofore assigned.

By the Court:

Q. When did you go to Kansas City, Mr. Thompson, with reference to the time the stoves were shipped, how long afterwards?

A. As near as I can, I guess four weeks. I am guessing at that.

Q. For the present I will not let the stoves go in but you may offer them in evidence later.

(To which ruling of the court in refusing to permit the stoves to be exhibited to the jury at this time, the plaintiff company, by counsel, excepted.)

By the Court: I believe you stated they were in the same condition now as when you saw them in Kansas City?
A. Yes, sir.

By Mr. Simms:

Q. Have you ever been reimbursed or paid in any way for the items of damages and expense about which you have testified here?
[fol. 56] A. No, sir.
Q. That will *dof of* the present; you may ask him.

Cross-examination.

By Attorney C. W. Strickling:

Q. I believe, Mr. Thompson, there were seventeen (1700) hundred of these stoves originally shipped, that is correct?
A. Seventeen hundred were shipped in the two cars.
Q. Shipped in two cars?
A. Yes.
Q. Now a part of these stoves were exposed in packing them, while as you say some of the stoves were packed in paper cartons?
A. Yes, sir.
Q. Those packed in the cartons were entirely covered with paper?
A. Yes, sir.
Q. Now how was the paper wrapped around those that were packed otherwise?
A. The paper was arranged around these stoves, just like you would pack anything else, just as you would wrap a package of sugar or coffee. The paper was brought around in this fashion, (illustrating) and tied around here, (illustrating).
Q. I understood you to say the stoves were entirely covered or enclosed in this paper, is that correct?
A. Yes, sir.
Q. I notice on these packages here that these seams are sealed, is that true of the paper in which the stoves in question were wrapped?
A. No sir, as I said a moment ago these are the new sacks that are now being used. There is a concern that manufactures these sacks now, but at this time we wrapped the stoves in paper as I showed you a moment ago. The paper was not sealed, as these sacks are.
[fol. 57] Q. Was it heavy paper?
A. About the weight of that paper.
Q. And they were completely enclosed?
A. Yes, sir.

Q. Were the stoves wrapped separately or wrapped together, Mr. Thompson?

A. The stoves would be wrapped separately. Some times the boys in loading would tear the paper.

Q. After they had been wrapped in the way you have explained, they would be crated in the ordinary box crates?

A. Yes, sir.

Q. Which consisted of slats?

A. Yes, sir.

Q. Now a part of these stoves, I believe you also stated were enclosed in cartons, were they?

A. Yes, sir.

Q. What was the nature of the material of these cartons, Mr. Thompson?

A. It is fibrous material, what we call straw board cartons, what was we generally shipped these stoves in.

Q. Just the ordinary paper board boxes?

A. No, sir, it is heavy, they stand two hundred and eighty pounds pressure and are approved by the Interstate Commerce Commission for such use.

Q. It was the ordinary box that was in general use?

A. Yes, sir, the standard box.

Q. With card board on the side and with corrugated centers?

A. No, sir, it was heavy straw Board boxes, but I believe there is some corrugation to it.

Q. How thick were the sides of these packing boxes?

A. One-fourth of an inch in thickness, I believe. They have been approved by the Interstate Commerce Commission. The Interstate Commerce Commission requires one-fourth inch.

Q. One fourth and not one-sixteenth?

[fol. 58] A. No, not one-sixteenth.

Q. This was one-fourth inch thick?

A. Yes, sir.

Q. How many stoves were in the packages, contained in the cartons?

A. There were 214 in cartons.

Q. There were 214 stoves shipped in cartons?

A. Yes, sir.

Q. And all the rest of them were shipped in crates?

A. Yes, sir.

Q. Wrapper in paper, as you would the ones shipped in the cartons, and the sides sealed with gum paper?

A. Yes, sir.

Q. Were they open at both ends or just one end?

A. The way the- are shipped or sent to the factory, they come knocked down, and we fold them, and seal one end and then set the stove down in the folded end, and later seal that end.

Q. How many types of stoves were in this shipments, Mr. Thompson, how many different kinds?

A. They were all one kind, Mr. Strickling, as a matter of fact,

but there were some few stoves that had nickel plating on the corners or nickel trimmings.

Q. They were different types, different sizes?

A. Yes, sir, fourteen inch, sixteen inch, eighteen inch, but otherwise they were just the same.

Q. Now considering the measurement and kind also, state to the jury how many different kinds there were altogether in this entire shipment?

A. Well, there were 286 14 inch black asbestos heaters, 192 sixteen inch, black asbestos heaters, 150 eighteen inch, black asbestos heaters, and one twenty inch, black asbestos heater——

(Counsel interrupts the witness.)

Q. What I am trying to get at, Mr. Thompson, and want to get into the record, the kind of stoves and the measurement, a general [fol. 59] description of the stoves that were originally contained in this shipment?

A. Well, there were fourteen inch, sixteen inch, eighteen inch, twenty inch, twenty-two inch, fourteen inch, nickel, sixteen inch, nickel, and twenty-two inch, nickel.

Q. How many of each of these different sizes?

A. I can't tell you exactly without getting my invoice. I can refer to my invoice and tell you the number of each size, Mr. Strickling.

Q. I will get you to look at it, what I want to know is the number of the various types of stoves that were originally shipped, if you have the invoice, you may refer to it to refresh your memory?

A. I would have to get that from my office. I have that invoice at my office, at the factory. I have here the number of different sizes that were returned, but not the number of each size that was originally shipped. I can get that invoice for you and have it afternoon.

Q. Will you try to obtain that information at the lunch hour and have it here at one thirty?

A. Sure, I will be glad to.

Q. Do you recall now what kind of stoves or what measurement of stoves was contained in the sealed cartons you have just described?

A. I cannot recall that exactly.

Q. Do you have a record that would indicate that or give you that information?

A. Yes, sir. We have a list of that. We do not keep that adsolutely correct, but we have a list covering that. We keep*t* that mighty near correct.

Q. Can you get that also?

A. Yes, sir, I think I can. I consulted it the other day and my recollection it is 214 cartons.

Q. When was it that you went to Kansas City, Mr. Thompson?

A. I can't give the exact date, Mr. Strickling.

[fol. 60] Q. It was about the 2nd of August wasn't it, of 1920?

A. It was four or five weeks after the shipment.

Q. At any rate it was four or five weeks after you made the shipment before you arrived there?

A. Yes, after we made the shipment.

Q. Before you went there?

A. Yes, sir.

Q. Didn't you testify in this case at the last trial that you didn't go to Kansas City until the second week after the shipment?

A. If I did I misunderstood the question, because it was six weeks after the shipment, because the stoves were so long on the road.

Q. Whenever you did go there, the time that you were there, didn't you see Mr. Herbert G. Gunter and Charles A. McCoy, the gentlemen whose depositions have been taken in this case?

A. Yes, sir.

Q. You just made one trip to Kansas City?

A. Just one trip in regard to this matter.

Q. At the time they were there, that is the time you were there?

A. That is the time I was there; yes, sir.

Q. You were not there when the stoves were received by Richards and Conover Hardware company?

A. No, sir.

Q. You don't know anything about the condition the stoves were received in except what they told you?

A. I had no personal observation of it, other than what they told me and what I saw when I arrived there.

Q. Now at this time you were there, I believe you said that the stoves had been there in storage in the warehouse?

A. They were there in the building; they were either on the second or third floor of the building, I can't recall which. I [fol. 61] remember of going up in the building.

Q. This time you speak of seeing two or three stoves that were in the cartons that were broken open, you do not know how they were broken open, do you?

A. Well, the carton was broken in transit. I think the cartons were broken open in transit.

Q. Well, do you know that?

A. Oh, no; no, sir.

Q. You do not know whether Richards & Conover Hardware company had opened them or not, before that time?

A. I am reasonably certain that Richards & Conover Hardware company didn't open the cartons, because they were stored in with the balance of the stoves.

Q. If they say they opened them, then you would be mistaken would you not?

A. Oh, no, I am not going to say that, because Mr. Gallaway told me that he opened a number of them.

Q. Who is Mr. Gallaway?

A. Purchasing agent of the stove department.

Q. For Richards & Conover Hardware company?

A. Yes, sir. And then I opened some of the cartons myself.

Q. How many of the cartons did you open?

A. I opened some twelve or thirteen.

Q. How many others did you see opened?

A. I didn't see any others opened. The rest of them were still packed. Mr. Gallaway first called my attention to it. He saw a foot of one of the stoves sticking out and he said——

(Counsel interrupts Mr. Thompson.)

Q. Never mind what Mr. Gallaway said. I just wanted to know how many others you saw opened?

A. I think there were some opened.

Q. Other than the two or three stoves which you say were opened, none of the other stoves in the cartons had been opened, had they, when you got there first?

A. I only recall three, Mr. Strickling. I only recall three stoves [fol. 62] being broken open at the time.

Q. They were in the pile?

A. That is all I saw.

Q. How were they opened; just opened up at one end?

A. The seal was broken and the carton was flared open, like a carton with the seal off will do.

Q. How many cartons did you say you opened?

A. I opened some twelve or thirteen.

Q. How many did you see opened and taken out of the cartons, Mr. Thompson?

A. We opened quite a few in the cartons.

Q. About how many?

A. The best answer I can make to that, and the closest I can come to it, I would say forty. I tried to get an accurate idea of what would be required to salvage them before I made the agreement with the boys.

Q. Do you know that the stoves in the cartons and the crates were packed just as you packed the stoves in the creates?

A. They were all packed practically at the same time. We used up all the cartons we had and then went to packing them in the crates.

Q. Did you use up all the cartons you had?

A. Yes, sir, we used all the cartons we had. We couldn't get any more cartons at that time.

Q. These cartons were, of course, different sizes, that is, to carry the different size stoves, were they?

A. I think we had a number of different sizes. That is just simply guess work. Any statement I make on that is simply guess.

Q. Do you recall the car numbers in which the stoves were packed?

A. I remember P. M. car No. 80272, and the other was P. M. car No. 81296. I recall that by referring to the bills of lading.

Q. Did you see the cars yourself?

A. I saw them; yes, sir.

Q. Did you see them before they were placed at your plant?

[fol. 63] A. No, not before they were placed there on the siding. I saw them afterwards.

Q. They were in good condition, first class condition?

A. Good cars, in first class condition. I don't think I ever shipped in better cars. No complaint whatever about the cars.

Q. I believe you stated, Mr. Thompson, that this is first car or the first order that you had shipped to Richards & Conover Hardware company of this kind of stoves?

A. Yes, sir, the first order.

Q. Do you recall how long it was before you made the shipment, that you received the order for them?

A. How long after I received the order before I made the shipment?

Q. Yes?

A. I can't say, Mr. Strickling, it was a long time. We had trouble in getting the material. I know I had to get material. I would say three weeks after we got the material in before we had the stoves fabricated in the factory. They were crowding us. One crew would be manufacturing them and the second crew would be packing them and loading.

Q. Just as soon as they were finished, they would be packed?

A. Yes, sir.

Q. In the way you have described?

A. Yes, sir, as fast as we could manufacture them.

Q. I believe you also stated that the only asbestos you placed on the stove, was on the fire front or burner back, as you termed it, and that you pasted a paper over the asbestos?

A. Yes, sir, paper pasted over the asbestos.

Q. What did you use in fastening that paper to the asbestos back, Mr. Thompson?

A. We used silica of soda.

Q. How did you apply it?

A. Right over the asbestos back used one here, (illustrating) placing the paper here, and the other end here, (illustrating) and [fol. 64] tying it here, (illustrating.)

Q. It is pasted again at the bottom?

A. It is pasted at the bottom, and at this point, (illustrating)

Q. You used silica soda for that?

A. Yes, sir, I might add that these stoves at that time had the backs fastened with rivets; one rivet being fastened at this point, (illustrating) another one here, (illustrating) and at these points here, (illustrating) The asbestos is fastened back here, (illustrating) Then it is riveted here to the sides of the stoves. In these stoves in question, we used rivets. At the present date they are welded with electricity. The asbestos is put on here with silica of soda, then the asbestos back is riveted to the back here, (illustrating)

Q. What I want to get into the record is how the asbestos is actually fastened or pasted to the back here, (illustrating)

A. It is put on there with silica soda, known as liquid glass.

Q. Known as liquid glass?

A. Yes, sir.

Q. I believe you stated while ago that of the original sevente-n (1700) hundred stoves, 992 were actually accepted by the Richards & Conover Hardware company, and 778 were returned to you as unsalable?

A. Yes, sir, it is shown on the face of the bill 992.

Q. 778 were returned and the balance kept by them?

A. Yes, sir.

Q. Now this invoice that you have testified about, which shows the first item of $3,700.80. Does that represent the market value of the stoves returned by the Richards & Conover Hardware company to you?

A. That represents the market value of the first item of $3,700.80.

Q. How many shipments did they return?

A. They returned two.

Q. In two cars?

[fol. 65] A. No, in one car. They billed me first and the same invoice they billed to the Chicago, Rock Island and Pacific railroad.

Q. We move to strike out the latter part of the answer as to Richards and Conover Hardware company billing the goods to the Chicago, Rock Island and Pacific Railroad.

(Motion to exclude overruled, to which ruling of the court the defendant, by counsel, excepted)

Q. What I want to get at, is what they billed to you, and what it was?

A. They billed forty one (41) additional stoves, which made the amount $281.00 and that is the second item on this invoice "To stoves as per Richards & Conover Hardware company, of January 27th, attached here, $281.00."

Q. Can you read into the record or can you give us the numbers and kinds of stoves that were returned to you by the Richards & Conover Hardware company?

A. There were 286 14-inch black asbestos heaters; 192 16-inch black asbestos heaters; 150 18-inch black asbestos heaters; 1 20-inch black asbestos heaters; 113 22-inch black asbestos heaters; 100 14-inch nickel; 3 16-inch nickel; 33 22-inch nickel.

Q. Now those stoves include both the $3,700.80 and $281.00, do they?

A. No, that just includes the first item only.

Q. What stoves were returned under the second item?

A. I don't believe I can give you that exactly; I don't know whether I can or not, but I expect I can get that from my records; but I will have to go to the record and get it.

Q. Can you give us the prices on those various types of stoves, just the item of price as to each of them?

A. The 14 inch stove is $3.75, total $1,072.50; 192 16 inch, [fol. 66] at $4.25, or $816.00. 150 18 inch $4.75, total $712.50. 1 20 inch, $5.25, total $5.25. 13 22 inch at $5.75, total $74.75. 100 14 inch, nickel, at $5.00, total $500.00.

Q. $500.00?

A. Yes, $500.00. 3 16 inch, nickel, $5.75, total $17.25. 33 22 inch, nickel, $8.75, $288.75.

Q. Now these two stoves that you have here, are you able to say that you actually saw these two stoves when you were in Kansas City?

A. I saw as I stated a moment ago, forty some stoves in cartons.

Q. You remember seeing those stoves?

A. Yes, sir, I remember seeing the stoves in the cartons, and I know these are the stoves that were sent to me by Richards & Conover Hardware company. I had these stoves marked and I told Mr. Gallaway to return me the cartons untouched.

Q. Did you bring them or did you send them back?

A. Sir?

Q. How did you bring them back?

A. Shipped them back.

Q. How?

A. Shipped them by express.

Q. Didn't you testify at the last trial of this case that these stoves had been taken out of that car load that had been shipped back to you from Richards & Conover Hardware company?

A. I am not absolutely certain about that, Mr. Strickling.

Q. You are not absolutely certain about that?

A. No, sir, I am not absolutely certain.

Q. I am talking about these two stoves right here?

A. These two stoves here?

Q. Yes?

A. Oh! I beg your pardon, I misunderstood you. These two stoves came in the car.

Q. In the car that Richards & Conover Hardware company shipped back to you?

[fol. 67] A. Yes, sir.

Q. Didn't you say you expressed them back?

A. Sir?

Q. Didn't you just say you expressed them?

A. Did you ask me how did I know they were the same stoves, and I told you I had Mr. Gallaway to mark these stoves in this carton so I would recognize them?

Q. No, I asked you if you could recognize these two stoves as being two of the stoves you saw there?

A. Oh! I beg your pardon. I misunderstood you.

Q. You are not telling the jury under oath that you saw those two particular stoves at Kansas City, are you?

A. No, sir, I can't say positively that I saw those particular stoves, but I can say they were returned to me from Richards & Conover Hardware company.

Q. I believe that is all I care to ask Mr. Thompson at the present time.

(Witness excused.)

HARLEY H. THOMPSON, sworn, testified on behalf of the plaintiff as follows:

Examination by Attorney Henry Simms:

Q. Will you give your name to the jury, please?
A. H. H. Thompson.
Q. Are you the son of Mr. A. F. Thompson here?
A. Yes, sir.
Q. You have been working for the A. F. Thompson Manufacturing company?
A. Yes, sir.
Q. Did you work for that company in 1920?
A. Yes, sir.
Q. I am going to ask you about two car loads of stoves that were shipped by the A. F. Thompson Manufacturing company to the Richards & Conover Hardware company in Kansas City, Missouri, [fol. 68] about the 9th of June, 1920. Do you know anything about those stoves?
A. I helped to load them and crate them and helped to build them.
Q. Did you see these stoves after they were crated and packed?
A. Yes, sir.
Q. Tell the jury what conditions the stoves were in when they were loaded into the railroad cars?
A. They were in first class condition, just as fast as we got them manufactured and crated, we loaded them into railroad cars.
Q. They didn't stay in the factory any time between the time they were manufactured and the time of loading?
A. No, sir, as soon as they were manufactured, they were hauled out of the factory and loaded; manufactured and then crated and loaded them right into the cars.
Q. Where were they loaded?
A. On the east spur of the switch.
Q. You had to haul them?
A. We had to haul them; yes, sir.
Q. That is all for the present.

Cross-examination by Attorney C. W. Strickling:

Q. You saw these cars were in good condition?
A. Good cars; yes, sir.
Q. You went and packed them out yourself?
A. Yes, sir.
Q. Out in the yard?
A. Yes, sir.
Q. That is all for the present.

(Witness excused.)

By Mr. Strickling: I want the record to show a renewal of our motion to strike out all the testimony of A. F. Thompson, as to the

[fol. 69] condition of the stoves, he testified to in Kansas City, on the ground that he was not there when the shipment was received and had no knowledge of their condition at the time the shipment was received.

(Motion to exclude overruled, to which ruling of the court the defendant company, by counsel, excepted.)

Thereupon counsel for the plaintiff company offered in evidence and read to the court and jury the depositions of J. H. Eads, J. L. Culp, and Charles Schons, in the words and figures as follows:

NOTICE TO TAKE TESTIMONY

[Title omitted]

The above named defendant will take notice that on Friday, the 4th day of November, 1921, the plaintiff above named will take the depositions of J. H. Eads, J. L. Culp and Charles Schons and Sundry other witnesses to be read and used as evidence in the trial of the above cause in behalf of the plaintiff at the office of Gossett, Ellis, Dietrich and Tyler, 608 Scarritt Building, in the city of Kansas City, County of Jackson, and State of Missouri, between the hours of 9 o'clock in the forenoon and 6 o'clock in the afternoon of said day, and if from any cause the taking of said depositions shall not be commenced, or being commenced shall not be completed on the day aforementioned, or being commenced shall not be completed on the day aforesaid, the taking of the same shall be adjourned from day to day or from time to time at the same place, between the same hours, until they are completed.

[fol. 70] A. F. Thompson Manufacturing Company, a corporation, by Simms & Staker, Attorneys.

Executed the within Notice by delivering a true copy thereof to Herbert Fitzpatrick, Attorney *in f*—— for the Chesapeake and Ohio Railway Company, a corporation, in Cabell County, West Virginia, he, the said Fitzpatrick, being a resident of said county, in my county of Cabell this 19th day of October 1921.

W. A. Williams, Sheriff, by M. M. Bevans, Deputy.

[Title omitted]

STATE OF MISSOURI,
County of Jackson, ss:

Depositions of sundry witnesses taken before me, George H. Roberts, a notary public within and for the county of Jackson and State of Missouri, pursuant to the annexed notice, of J. H. Eads, J. L. Culp, and Charles Schons, and at the time and place therein specified, to be read in evidence on behalf of the plaintiff in an action pending in the Circuit Court of Cabell County, West Virginia, at Huntington, in which A. F. Thompson Manufacturing Company, a corporation, is plaintiff and the Chesapeake & [fol. 71] Ohio Railway Company, a corporation, is defendant.

Messrs. Gossett, Ellis, Deitrich and Tyler, by Mr. Tyler, appeared for plaintiff.
Mr. C. W. Strickling appeared for defendant.

It was thereupon agreed by the parties present that the signatures of the witnesses hereto should be waived, and so certified by the notary.

George H. Roberts, Notary Public. (Seal.)

And thereupon J. L. CULP, of lawful age, being by me first duly cautioned and sworn, deposes and says:

Direct examination:

By Mr. Tyler: You may state your name?

A. J. L. Culp.
Q. Where do you live?
A. I live at 1328 Waverly Avenue, Kansas City, Kansas.
Q. Where are you employed, Mr. Culp?
A. At the Ricards and Conover Hardware Company, Kansas City.
Q. How long have you been employed there?
A. Between twenty-three and twenty-four years; I'll say twenty-three years to be safe.
Q. How long have you been connected with the hardware business?
A. I have been connected with the hardware business practically all the time I have been there.
Q. What is your work down there?
A. Well I have charge of the loading and unloading of cars, delivery of shipping and warehouse department.
Q. Were you employed by the Richards & Conover people in that capacity during the months of June and July 1920?
A. Yes, sir.
[fol. 72] Q. I will ask you if you remember of any shipment of

stoves arriving at about that time from A. F. Thompson Manufacturing Company, of Huntington, West Virginia?

A. Yes, sir,—just a minute, you say in June?

Q. Yes in June or July 1920?

A. Yes, sir, I think about the first part of July.

Q. I will ask you if you remember on what day of the week that shipment arrived?

A. I can't tell you on what day it arrived but I can tell you the day it was unloaded there in the yard.

Q. What day was it unloaded there in the yard?

A. It was unloaded on Sunday, I think Sunday the 4th of July, I think it was Sunday the 4th of July.

Q. Now how soon was it unloaded after it was placed at your warehouse?

A. I think Sunday came on the 4th of July, it was either Saturday,—we do not work Saturday afternoons, I would not be positive about this, we do not work Saturday afternoons, we might have left it on the track from Friday, I don't know it could not have been there two days at the outside.

Q. You are sure it was not set at your warehouse more than two days before it was unloaded?

A. Yes, sir, I am sure.

Q. Who had charge of this unloading?

A. Mr. Schons.

Q. Did you take part in the unloading yourself?

A. Yes, sir.

Q. How large a shipment was this?

A. I think there was something like sixteen or seventeen hundred stoves in the shipment.

Q. How many cars?

A. Two cars.

Q. How were the stoves packed?

A. Some of them were cartons and some were crated, just a skeleton crate, I think.

[fol. 73] Q. About what proportion were in crates and in cartons?

A. I am not right positive, I think there were more in crates than in the cartons, that is my recollection on that.

Q. Did you have occasion to notice the condition of these stoves when you unloaded them?

A. Yes, sir.

Q. What was the condition of the stoves in the crates?

A. They were in bad condition.

Q. Describe how the condition was bad?

A. They were packed in good shape and loaded in good shape, but what we noted, I think probably if there had been paper on there, we would not have noticed, the legs were rusted, the legs and nickel that stuck down below, and that is the way we discovered and examined them thoroughly, and we did sort them out for a while, but we quit it, we saw that we were up against it, they were in bad condition on account of the rust.

Q. Were they rusted just a little or a great deal?

A. Well, some of them were slightly rusted and some quite a bit, that is in real bad condition.

Q. Can you tell from your experience in the hardware business whether an article of this kind is salable as a first class article or not?

A. No, it was not salable.

Q. I ask you first can you tell from your experience?

A. Yes, sir.

Q. Now I will ask you whether those stoves were salable as first class article?

A. Not all of them, no, sir.

Q. Was there any difference in the condition of the stoves packed in the cartons and those packed in crates?

A. I did not examine but very few of the cartons, but there was I think, those in the crates, I think, I know they were in worse condition than those in the cartons.

Q. Do you know whether some of the stoves shipped were kept by Richards & Conover?

[fol. 74] A. Yes, sir, some were kept.

Q. Do you know whether the ones which were kept were the ones which were shipped in cartons or crates?

A. I think practically all that they kept were in cartons, that is my knowledge of it.

Q. Have you seen any of the stoves shipped in cartons recently?

A. Yes, sir.

Q. In what condition were they?

A. They were in fairly good condition. I only looked at a few of them, two or three, I had no occasion to look any further.

Q. You only looked at a few of them?

A. Yes, sir.

Q. Have these stoves fastened to them, or stamped on them, the name of any firm?

A. Yes, sir.

Q. What name is that?

A. A. F. Thompson.

Q. Describe how these stoves were rusted, what parts were rusted and to what extent they were rusted?

A. Practically all of the nickel, I think was rusted, they were made, of course, out of black sheet iron, that is what I call it, which will rust, any dampness will rust it, or in dark weather or anything like that, may be a spot as large as your hand, and may be the whole side of it was rusted. When that black on it is rusted it is no good.

Mr. Strickling: Defendant moves to strike out the answer.

Mr. Tyler: Could that rust have been rubbed off with a rag leaving the stoves as good as new or was it too deep for that?

A. No, it could not, it would help some, but it was too deep for that. Even if it ha-n't been deep, it would not helped very much.

Q. Could you say whether this rust had been on the stoves for [fol. 75] some length of time or whether it was just freshly formed on the stoves?

Mr. Strickling: That is objected to by defendant.

Objection overruled.

A. I would not like to say that; some were worse than others and lo-ked like they might have been rusted longer than others, some looked like they were not rusted so bad and looked like some that were rusted hadn't been so long and were not rusted so badly.

Q. What per cent from the ordinary selling price could those rusted stoves, which were returned have been sold for?

Mr. Strickling: That is objected to by defendant.

Objection overruled.

A. I would not want to say that.

Q. Could they have been sold for half of the selling price?

Mr. Strickling: Objected to by the defendant.
Objection overruled.

A. Well, in a case of that kind you have to practically take what they want to give you for it. I would not want to say.

Q. Do you know how many stoves were kept, and how many were returned?

A. No, sir.

Q. You can't say that?

A. No, I say I don't know.

Mr. Tyler: That is all.

Cross-examination by Mr. Strickling:

Q. What is your position with Richards & Conover?

A. Foreman.

Q. Foreman of what?

A. Of the unloading and shipping and city delivery and loading everything that loads out.

Q. That is you load and unload all shipments which come into Richards & Conover's warehouse?

[fol. 76] A. Yes, sir. In my d-partment and under my department.

Q. Of which department do you have charge?

A. I have charge of that department and have charge of everything loads out and everything is unloaded out of the cars.

Q. You did have charge of this particular shipment contained in these two cars, did you?

A. Sure.

Q. Do you have any independent recollection yourself of the shipment?

A. I have recollection of unloading it, yes, sir.

Q. When was it that shipment arrived?

A. The one which I recollect was the first of July.

Q. As a matter of fact it arrived in Kansas City, the 26th of June?

A. I don't know.

Q. And they unloaded it at Richards & Conover's warehouse on the 27th?

A. I couldn't say.

Q. In other words, you don't know when it did arrive?

A. I would say it was the first of July sometime, it strikes me on the 4th we unloaded.

Q. It is not a fact your saying it was on the 1st of July is a mere surmise or guess on your part?

A. Well, I don't know whether it was.

Q. Have you any delivery record with you to show the exact date of their arrival?

A. I have not, I think the man who has charge of the unloading,—I will say I haven't right here.

Q. You have no independent recollection?

A. No, sir.

Q. You have no independent recollection of exactly what day the shipment did arrive?

A. No, no specific day.

Q. How many stoves were in those two cars.

[fol. 77] A. Well I think about sixteen, may be seventeen or eighteen.

Q. Do you know how many?

A. No, I do not.

Mr. Tyler: When you say sixteen, seventeen or eighteen what do you mean?

A. I will say between sixteen and eighteen hundred.

Mr. Strickling: The fact of the matter is you do not know exactly how many were in the cars, you are just estimating how many were in there?

A. Yes, sir, just estimating it.

Q. Now when you unloaded the stoves tell exactly what you did and the manner in which you unloaded them and what you did with them after you got them off of the car?

A. In the first place, I was in the car and we had a gang down there unloading and noticed the others which were crated, if we put them in our stock, in our regular stove stock, we discovered they were in bad condition, and we started to separate those which were in bad condition,—but I put them in with the good ones, we found out that we only had a very small place to put them, by dividing them up and making two piles, we did not have room to do that, and finally we had to quit sorting them out.

Q. In other words, when you unloaded them you put them altogether?

A. No, not altogether, we sorted out until we found we did not have room, where we would have had room if they were all in good condition, by making the two piles, we had to sort them out until we found out we had too much to separate and we had to put them in with the good ones, and would have to sort them again.

A. At the time you unloaded them did you make any thorough examination of the condition of the stoves?

A. Yes, sure.
Q. I believe you say part of them were packed in cartons?
[fol. 78] A. Yes, sir.
Q. Two stoves in a crate?
A. Not all of them.
Q. Part of them were packed in ordinary open crates?
A. Yes, sir.
Q. And part of them were packed in corrugated pastboard cartons?
A. Yes, sir.
Q. And those in cartons the seams were sealed with gum paper?
A. Yes, sir.
Q. Now in this examination of which you spoke, was that confined to the stoves packed in the cartons?
A. I don't think we made as thorough examination of the cartons as we did the crates; those in the crates were visable, that would lead you to believe we examined those in the cartons too.
Q. Did you do that?
A. Well some, not over half a dozen.
Q. You found some of them to be rusted in the cartons?
A. Yes, sir.
Q. Now about what proportion of the stoves that were in cartons and about what proportion were in crates?
A. That is a pretty hard question to answer.
Q. Do you know?
A. No, I do not know for sure.
—. You do not know either how many stoves were in good condition and how many were in an unsalable condition?
A. No, sir.
Q. Now after they were unloaded, as you have described, did you have anything more to do with them after that?
A. No, not directly I didn't have.
Q. In other words, your duties extended only to unloading and when this is concluded you are through?
[fol. 79] A. Yes, my duty was through there, except to have them moved, that would come along in my department.
Q. Did you finally sort them out?
A. They were partly sorted out, they were I think eventually.
Q. Did you do that?
A. Yes, sir.
Q. You do not know anything about that?
A. No, sir.
Q. Of your own knowledge you do not know that?
A. No, sir.

Redirect examination:

By Mr. Tyler: Are you sure that the cars containing these stoves, were placed on the track by your warehouse on the Saturday or Friday night preceding their unloading?
A. No, I would not swear to that. But I rather think if we unloaded them they were.

Mr. Strickling: Defendant moves to strike out the answer, on the ground that it is a mere surmise of the witness, and not a fact within his knowledge.

Sustained—excepted.

Mr. Tyler: We consent to that.

Q. Do you know whether these cars were on the tracks preceding the Thursday of the unloading?

Mr. Strickling: That is objected to by defendant on the ground the witness has already stated he did not know.
Mr. Tyler: He stated he did not know as to Friday.

A. I will say they were not.
Q. I believe you stated that the stoves which you saw in the cartons were not so rusted as the ones in the crates?

Mr. Strickling: Question is objected to by defendant.
Overruled.

A. Yes, sir.
Q. Was there much difference between the ones in the cartons [fol. 80] and the ones in the crates as to rustiness?

Mr. Strickling: Question is objected to by defendant.
Overruled.

A. Those sent singly in cartons, those I say were not so bad as those which were crated.
Q. You have some of those stoves in your warehouse now?
A. Yes, sir.
Q. Are they in crates or cartons?
A. We might have one or two in crates, I don't know about that, we have some in cartons yet.
Q. Practically all of those which were kept are in cartons?

Mr. Strickling: That is objected to by defendant.
Overruled.

A. Yes, sir.

By Mr. Strickling:

Q. Now you have stated these *these* cars were not on the track Thursday preceding the Sunday which they were unloaded, how do you know that?
A. I know it by this, we do not usually leave cars on the track that long.
Q. Independently of what you usually do, do you know as an absolute fact those cars were not on that track the preceding Thursday?
A. No, I don't know they were not on the track.
Q. Now you have stated in response to Mr. Tyler's question that

the stoves in the cartons were not as badly rusted as those in the crates?

A. Yes, sir.

Q. Now there was not very much difference as a matter of fact?

A. Yes, I think there was quite a difference.

Q. In what respect?

A. I will say the nickel, I think was not as rusty or the sheet iron that they are made out of, was not in as bad condition.

Q. At the same time those in the cartons rusted the same as the [fol. 81] others?

Mr. Tyler: That is objected to by the plaintiff. The question has already been answered.

Overruled.

A. No not the same.

Q. They were rusted?

Mr. Tyler: That is objected to by plaintiff.

Overruled.

A. They were in a damaged condition those I looked at, but I say not to the extent of the others.

Q. Do you know anything about the number of stoves which were returned to the Thompson Manufacturing Company?

A. No, I do not.

The signature of this witness was waived by both parties in my presence this 4th day of November, 1921.

Geo. H. Roberts, Notary Public, Jackson County, Missouri.
(Seal.)

Also CHARLES SCHONS, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Direct examination:

By Mr. Tyler:

Q. Please state your name?

A. Charles Schons.

Q. Where do you live?

A. 1512 North 16th street, Kansas City, Kansas.

Q. Where are you employed?

—. Richards & Conover Hardware Co.

Q. How long have you been with them?

A. Five years past.

Q. How long have you been in the hardware business?

A. Just the time I have been with them, five years.

Q. What is your position there?

[fol. 82] A. Checking out the cars when unloaded and loading.

Q. Were you engaged in that work in the months of June and July, 1920?

A. Yes, sir.

Q. Do you remember the incident of the shipment of some stoves from the A. F. Thompson Manufacturing Co.?

A. Yes, sir.

Q. Do you remember the day of the week on which those stoves were unloaded?

A. Yes, sir.

Q. What day was it?

A. Sunday.

Q. Do you know when those cars were put on the tracks by your warehouse?

A. Yes, sir.

Q. When was it?

A. One was set on July 1st at night. The night of July 1st.

Q. What day of the week was July 1st, do you remember?

A. No, I do not remember. One was set July 3rd, the night of the third.

Q. How long had those cars been on the track by the warehouse before they were unloaded?

A. Tha- one was set on there was unloaded the next day, the one was set there, the one set two days and one unloaded the next day after it was set in the evening.

Q. Who had charge of this unloading?

A. Mr. Culp had charge of the gang, I was checking the cars *cars* when they were unloading.

Q. Were you present all the time those cars were being unloaded?

A. Yes, sir.

Q. Two cars both full of stoves?

A. Yes, sir.

Q. Do you know how many stoves there were?

[fol. 83] A. No, sir, not exactly.

Q. Can you tell about how many?

A. I should say around sixteen or seventeen hundred stoves in the two cars.

Q. Did you have occasion to examine the condition of those stoves, as they were being unloaded?

A. Yes, sir.

Q. Was that part of your work?

A. Yes, sir.

Q. In what way were those stoves packed?

A. Some of them were packed in crates, crates nailed around them. Some had two stoves to a crate and some one; some were packed in cartons, paper cartons.

Q. Describe what you mean by a carton?

A. That is pasteboard made up in little boxes put around the stove and sealed over the top with that sticky paper.

Q. All of the stoves with a carton is completely covered?

A. Yes, sir.

Q. About what quantity were packed in cartons and what part in crates?

A. Well, I could not say exactly. I would say about twenty-five per cent were in cartons.

Q. What was the condition of the stoves in crates?

A. The condition, what I would say bad.

Q. Describe what you mean by bad?

A. They were rusted.

Q. What part of them were rusted?

A. The nickel that was on them, what little nickel there — on them was rusted. And the legs were rusted. They were made out of sheet iron, was rusted in spots, and some were larger than others.

Q. They were rusted in spots?

A. Yes, sir.

Q. And the nickel was rusted?

A. Yes, sir.

Q. Would you say they were badly rusted or only slightly rusted?

[fol. 84] A. I would say part of them were pretty badly rusted.

Q. Was there any difference between the condition of the stoves in crates and those in the cartons?

A. Yes, sir, there was some difference.

Q. State what the difference was?

A. Some of them, I only examined a few in the cartons, three or four of them were not as badly rusted as the crates.

Q. Do you know whether some of the stoves were sent back or not?

A. Yes, sir, some of the stoves were sent back.

Q. Were the ones which were sent back those that came in the cartons or the crates?

A. Well, I couldn't say, the biggest part of them,—if there was any cartons sent back, it was mighty few.

Q. Are you still down in the warehouse of Richards & Conover?

A. Yes, sir.

Q. You are there every day?

A. Yes, sir.

Q. Do you see any of those stoves from day to day still there?

A. Some of them are there yet.

Q. In the cartons or crates?

A. In the cartons.

Q. Have you seen any of them recently?

A. Yes, sir.

Q. What condition are they in?

A. They are not first class.

Q. Are they better than the ones in crates?

A. Yes, sir.

Q. You say they are better?

A. Yes, sir.

Q. Very much better?

A. Well, yes, considerably.

[fol. 85] Cross-examination.

By Mr. Strickling:

Q. I believe you said you checked out this shipment as they came out of the cars?

A. Yes, sir.

Q. In other words, your duty down there was to see whether you got the number of stoves your invoice called for?

A. Yes, sir, to see that all the goods come in O. K.

Q. And at the same time you checked them to see whether they all come or not and you also look them over to see if they are in good shape?

A. Yes, sir.

Q. Were you there checking the stoves at the same time Mr. Culp was supervising the unloading?

A. Yes, sir.

Q. You and he together opened up some of the stoves to see the condition of the stoves was there?

A. Yes, sir.

Q. And you found the condition of the stoves in the cartons to be rusted also?

A. Yes, sir.

Q. Those are the ones you examined?

A. Yes, sir.

Q. Now some of the stoves you made some examination or started to make some examination, you started to see whether some were rusted and some were not?

A. Yes, sir of the crates.

Q. And you found some in good condition and some bad?

A. Yes, some were in fair condition.

Q. Some in the crates?

A. Yes, sir.

Q. Were practically all of the stoves in the entire shipment rusty?

A. No, I would not say that, because I don't know.

[fol. 86] Q. Do you know anything about the number were returned to Thompson Manufacturing Co.?

A. No, I don't know how many.

Q. Do you know anything about how much the Thompson Manufacturing Co. was paid for the stoves which you did keep?

A. No, sir.

Q. Now you said, I believe, that one of the cars was placed on the 1st day of July and the other on the 3rd of July, how do you know that?

A. Yes, sir.

Q. I ask you how do you know that?

A. I have the car record.

Q. Have you that record with you?

A. I have a copy of it.

Q. Let me see it please (hands in the duplicate)—when this car came in did you inspect it? Did you inspect it yourself?

A. Yes, sir, I came over the morning before I started to work, I

got there early and came down and got the seal numbers and the car numbers.

Q. Did you get the seals?

A. Yes, sir.

Q. They were unbroken?

A. Yes, sir.

Q. And the cars, were they brand-new cars?

A. They were good looking cars, I would not say they were brand-new.

Q. These cars which had been built during the governmental control of the railroads, practically new cars?

A. I could not say they were built during governmental control.

Q. You could not say that?

A. No, sir.

Q. They were practically a new type of car?

A. Yes, sir.

Q. Would you say the cars were in first class condition?

[fol. 87] A. Yes, I would.

Q. You do not know anything about when Richards & Conover Hardware Company were notified that these cars were ready for delivery.

A. No, sir.

Q. What you are testifying about is when the cars were actually set in? Is that it?

A. Yes, sir. Ready to unload.

Q. After these stoves were unloaded July 4th, did you have anything further to do with them?

A. No, sir.

Q. You had nothing further to do with them?

A. Not until they went to send them to the depot.

Q. Then what did you do?

A. I loaded them out.

Q. You were not present when the Thompson Manufacturing Company was with some railroad officials on an investigation?

A. No, sir.

Q. You were not there at that time?

A. No, sir.

Redirect examination:

By Mr. Tyler: Do you remember of your own personal knowledge that these cars were set on the track within two or three days of the time they were unloaded?

A. I will say three days from the time they were unloaded.

Q. You remember that of your own personal knowledge, without relying on the record of it?

A. Yes, sir.

Q. Were all of those stoves which were in cartons, which you examined, were they all rusted?

A. They had spots on them, yes, sir.

Q. Was there a great difference between the ones which were in cartons and the ones in the crates as to the amount of rust?

[fol. 88] Mr. Strickling: That is objected to by defendant.

Overruled.

A. Yes, sir, there was a difference in them.

Q. Now I will ask you what difference, if any, there was in the condition of the stoves packed in the cartons and the stoves packed in the crates?

A. I will say that those packed in the cartons, what spots there was on them were very small, on the nickel, any spots on the nickel would be just little spots and what was on the crated ones would be big spots.

Mr. Strickling: You said the stoves which are down there now, part of this same shipment, are in first class condition?

A. No. I would not call them first class condition.

Q. And never have been in first class condition?

A. Not since they have been at Richards & Conover's.

(That is all.)

The signature of this witness was waived by both of the parties this day, November 4th 1921.

Geo. H. Roberts, Notary Public, Jackson County, Missouri.
(Seal.)

Also JAMES H. EADS, of lawful age, being by me first duly cautioned and sworn, deposes and says:

Direct examination:

By Mr. Tyler: Please state your name?

A. James H. Eads.

Q. Where do you live?

A. Out here at Mount Washington, Mo., close to Fairmont Park.

[fol. 89] Q. Where are you employed?

A. At Richards & Conover's Hardware Company.

Q. What is your position there?

A. I am assistant to the traffic manager.

Q. How long have you been with the Richards-Conover Hardware Company?

A. In the neighborhood of ten years.

Q. What was your position with the Richards & Conover Hardware Company during the months of July and June 1920?

A. I was assistant to the traffic manager.

Q. That is the same position that you have now?

A. Yes, sir.

Q. In your position do you have charge of the records of shipments into the company and returned from the company?

A. Partly and the traffic manager has the other part.

Q. You do take care of those records under his direction?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. State if you have the records as to the shipments of stoves made by the A. F. Thompson Manufacturing Company to the Richards & Conover Hardware Company in June or July 1920?

A. Yes, sir.

Q. Have you those records with you?

A. Yes, sir.

Q. Will you state from that record how many stoves were shipped by the A. F. Thompson Manufacturing Company to Richards & Conover Hardware company in June or July 1920?

A. Two car loads; these two cars consisted of seventeen hundred stoves; eight hundred of these stoves were shipped in car P. M. 80272 and nine hundred were shipped in car P. M. 81296, totaling seventeen hundred stoves invoiced.

Q. Was there any other shipments of stoves besides the ones [fol. 90] which you have just described from Thompson Manufacturing Company to Richards & Conover Hardware Company about that time?

A. None to my recollection.

Q. Have you with you the record as to the return of any of these stoves?

A. Yes, sir.

Q. Will you state from that record how many stoves—how many of these stoves were returned?

A. Yes, sir.

Q. How many were there?

A. Eight hundred and twenty-one.

Q. 821?

A. Yes, sir.

Q. Did you have occasion to look at these stoves after they were in your warehouse?

A. Yes, sir.

Q. I will ask you in what condition those stoves were?

A. Some of them were in pretty bad condition, rusted, the rust eat into the iron; these stoves were worked over; three different fellows, I think three, worked these stoves over and at that time they were pretty badly in need—we were badly in need of this line of goods and wanted to keep them, as many of them as possible and therefore they worked these stoves over and some of the stoves were kept which were not in first class condition, because there was a great demand for this line of goods.

Q. Was there any difference in the condition of the stoves in the cartons and those in the crates?

A. Yes, sir, the ones that I looked at were.

Q. What was the condition?

A. The ones in the cartons were in better condition than those in the crates, I mean as to the rust and splotches, the rust was not so large.

Q. Have you had occasion to look at any of those that you have on hand recently?

A. Yes, sir.

[fol. 91] Q. What is their condition?

A. I would not call them in first class condition.

Q. What was their condition as to the ones sent back?

A. Well a little better than the ones sent back.

Q. The ones that you have on hand now—are they in cartons or crates?

A. The ones I have seen are in cartons.

Q. Do you know whether the ones you sent back are the ones shipped in cartons or crates?

A. I could not say whether any in cartons were sent back or not. The biggest majority were in crates.

Q. You do not know whether any of those in cartons went back or not?

A. No, sir.

Q. If there were any cartons sent back it was a very few?

A. Yes, sir, that is my recollection, a few.

Q. Now will the records of the Richards & Conover Hardware Company show when these cars were placed on your track and unloaded?

A. I think not on that. Yes, the record will show.

Q. Have you those records there?

A. I looked at the record before I came up, I did not have to bring it.

Q. What do the records show?

A. My recollection is, I looked at them yesterday, one of those cars was placed on the track July 1, 1920 and the other was placed on the track, was set the morning of the 4th. That is my recollection of it. I have the record down there which will show exactly.

Q. You have the record of that?

A. Yes, the record will show exactly the time and date whether morning or afternoon.

Q. Do the records show when the cars were unloaded?

A. Yes, the day they were unloaded.

Q. What day was that?

[fol. 92] A. Sunday July 4th.

Q. Did you make out any claim on account of the bad condition of these stoves?

A. Yes, sir, I made up a claim myself.

Q. What was the ground in your claim for rejecting these stoves?

Mr. Strickling: That is objected to by defendant.

Overruled.

A. The stoves were in an unsalable condition.

Q. Does your experience in the hardware business, as to what stoves were and what were not in a salable condition, as first class stoves?

A. Yes, sir.

Q. Now to the best of your recollection, and in your experience and knowledge, will you say whether these stoves were or were

not,—whether the stoves which were returned were or were not salable as first class stoves?

A. They were not.

Cross-examination.

By Mr. Strickling:

Q. These stoves were two sizes, were they not?

A. They were more than two sizes.

Q. They were more than two sizes?

A. Yes, sir.

Q. How many more were there?

A. More than two sizes, and also some were body black, some were nickel, trimmed in nickel.

Q. And they were different prices?

A. Yes, sir.

Q. What was the invoice price billed to you?

A. They ranged,—shall I quote each price?

Q. No not every individual stove?

[fol. 93] A. This shipment consisted of 100 only No. 12 black asbestos heaters $3.25 each, total——

Q. Never mind the total, just go ahead.

A. 300 No. 14 black asbestos heaters, $3.75 each. 200 No. 16 same $4.25 each. 200 No. 18 same $4.75 each. 100 No. 20 same $5.25 each. 300 No. 22 same $5.75 each. 100 No. 14 nickel asbestos $5.00 each. 100 No. 16 same $5.75 each. 100 No. 18 same $6.75 each. 100 No. 20 same $7.75 each. 100 No. 22 same $8.75 each, total 1700 stoves.

Q. Have you any means of telling what number of these various classes of stoves were returned to the Thompson Manufacturing Co., at Huntington?

A. Yes, sir.

Q. I believe the total returned was 821?

A. Yes, sir.

Q. Now how many of the various numbers of stoves and what was the number of each kind returned, just identify each kind and the number of each kind sent back?

A. 286 No. 14 black asbestos heaters; 179 16s same thing.

Q. Read them off the name and price?

A. The first one 286 No. 14 black asbestos.

Q. What was the price?

A. $3.75 each.

Q. Now the second one?

A. 179 16s same thing $4.25 each. 147 18s same thing $4.75 each. Two only No. 20 same thing $5.25 each. 20 only No. 22 same $5.75 each. 97 only No. 14 nickel asbestos heaters $5.00 each. 50 only No. 16 same $5.75. One only No. 18 same $6.75 each. And 39 only same No. 22 $75.00.

Q. Now those prices which you have named there were the prices at which these stoves were invoiced to the Richards & Conover Hardware Company?

A. I did not make up this bill here, I presume they are, they should be at least.

Q. Isn't that first statement which you read from the original in-
[fol. 94] voice of Richards & Conover Hardware Company?

A. Yes, sir.

Q. And shows the prices at which they were invoiced to Richards & Conover Hardware Company?

A. Yes, sir.

Q. Were you present at the time this shipment was inspected by Mr. A. F. T——, of Huntington, and Mr. Gunter of the Rock Island Line, and Mr. McCoy of the Western Weighing & Inspection Bureau?

A. Now when these three men were there together—they were there together—I was not present.

Q. Were you there when Mr. Frankie, who is the chief chemist of the Rock Island Line, came to your warehouse to select two stoves?

A. I don't remember the man's name. I went down with some chemist from the Rock Island road.

Q. And helped him select two stoves?

A. Yes, sir.

Q. Do you remember how those stoves were selected?

A. We just picked out stoves which were in ordinary condition, the same as the biggest majority of them.

Q. Were you familiar with the entire shipment of stoves as they inspected and unloaded them?

A. I did not have anything to do with the inspecting.

Q. You had seen them?

A. Yes, I had seen them.

Q. Now did the stoves which you and Mr. Frankie selected at that time represent the average condition of that shipment?

A. Yes, sir.

Mr. Tyler: You helped to select these stoves?

A. Yes, sir, I would say the stoves they did select of those, I will say they were just of the average.

Mr. Strickling: One of those stoves had been packed in crates and one in the cartons?

A. Yes, that is my recollection of it.

Q. Do your records indicate in any way the number of those [fol. 95] stoves packed in crates and the number packed in cartons?

A. No, sir.

Q. Does it indicate the kind of stoves which you enumerated they packed in cartons and crates, which you have read. A certain class of stoves which was read by numbers?

A. Yes, sir.

Q. Now have you anything which would indicate which of those various classes of stoves were packed in crates and which were packed in cartons?

A. No, sir, nothing to indicate how they were packed.

The signature of this witness was waived by the parties in my presence on this 4th day of November 1921.

Geo. H. Roberts, Notary Public, Jackson County, Missouri.
(Seal.)

STATE OF MISSOURI.
County of Jackson, ss:

I, George H. Roberts, a Notary Public in and for the County of Jackson and State of Missouri, duly commissioned and qualified, do hereby certify that the above named witnesses J. L. Culp, Charles Schons and James E. Eads, were by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the above entitled cause as above set forth, and that the same were reduced to short hand writing by me and subsequently transcribed; that at the time of the taking of said depositions, both parties in my presence waived the signatures of the witnesses to these depositions and same should be so certified.

I further certify that I am not counsel, attorney or relative me pursuant to and at the time and place and the hour specified in the notice hereto attached.

I further certify that I am not counsel, attorney or relative of either party or otherwise interested in the event of this suit; and I further certify that at the time of taking said depositions I was duly [fol. 96] qualified and acting notary public for and in the County of Jackson and State of Missouri.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal at my office in Kansas City, Jackson County, Missouri, this 4th day of November A. D. 1921.

My commission expires September 1st, 1925.

George H. Roberts, Notary Public, Jackson County, Missouri.
(Seal.)

Notary and Stenographer fees:

Depositions	$11.70
Subp.—Service and Return	2.50
Notary & Certif.	2.00
	$16.20

G. H. R., Notary.

OFFERS IN EVIDENCE

By Mr. Simms: Counsel for plaintiff company now offers to exhibit to the jury the two stoves about which the witness, A. F. Thompson, has testified.

By Mr. Strickling: To which offer and exhibition of the stoves to the jury, the defendant, by counsel, objects, for the reason that

the witness has not properly identified the stoves and has no knowledge of the condition of the stoves at the time of their receipt by the consignee at Kansas City, and for other reasons.

(Objection overruled, to which ruling of the court the defendant, by counsel, excepted.)

A. F. Thompson, recalled, testified as follows:

By the Court:

Q. These two stoves were in the original shipment returned to you [fol. 97] by the Richards & Conover Hardware Company?
A. Yes, sir, the only shipment they made.
Q. The only shipment the Richards & Conover Hardware Company made to you?
A. Yes, sir.
Q. The original shipment to you?
A. Yes, sir.

By Mr. Simms:

Q. These are two of the stoves rejected by the Richards & Conover Hardware company?
A. Yes, sir.
Q. And sent back by them?
A. Yes, sir.
Q. Now, Mr. Thompson, just take these two stoves and point out to the jury where they are rusted, both on the inside and outside, making your own comments to the Reporter?
A. (Mr. Thompson leaves the stand.) I believe I can show you now more accurately the way the stoves were shipped. They were shipped in that position, (illustrating) face to face, just like that, (illustrating.) Now the question brought up in regard to this asbestos. We make up this part of the stove in large quantities, I would say twenty thousand at a time, at the early part of the season, and then later when they are manufactured, the burners are placed here, as you see, and then we place the asbestos here. You will notice there is a paper wrapped around there, and it comes across and is fastened there. This back is held in position by these rivets. The jury can see the position of the different rivets, so the back is fastened. As I stated a while ago, this paper is wrapped around the stove in this fashion, and is fastened here and here. That holds the paper in position. Now you will notice that the outside of these stoves are not at all like the inside. The insides are not rusty.

By Mr. Strickling: We object to the witness arguing the question. [fol. 98] By the Court: Just make your explanation Mr. Thompson.
A. You take both stoves and you will find there is no rust inside.

By one of the jurors:

Q. I will ask you to unwrap the legs of the stoves, to show us the condition of the legs.

A. (Mr. Thompson unwraps the legs of each stove.) You find the same rust on the outside but there is no rust whatever on the inside of the stove, and this asbestos is in good condition. When these stoves came back all of this paper was literally sticking to the stove, and when we pulled it off, we found this rusty condition. The inside of the stoves are not rusty at all. There is the stove for the court's inspection.

Q. How badly is the outside of the stove rusted?

A. The outside is rusted pretty badly; there is rust practically all over the outside, especially where the paper stuck to it.

Q. Are these two stoves typical of the other stoves that Richards & Conover Hardware company rejected?

A. Yes, sir, they are just about like the other stoves that were rejected by the Richards & Conover Hardware company.

Q. Are they in the condition they were in, when you were in Kansas City?

A. Just like the others; very much like the others. When you first removed the paper there would be the little raised pits of rust. That is the thing that worried the whole bunch, what caused the rust to stand out in those small spots like it does. I never saw anything like it before.

Q. Does the asbestos on the inside, in any way touch or connect the metal on the outside that is rusted?

A. No, sir.

Q. It does not connect in any way to the metal on the outside?

A. No, sir, it does not.

Q. I believe that is all.

[fol. 99] Cross-examination by Attorney C. W. Strickling:

Q. Mr. Thomspon, Do you say these stoves are in the same condition that they were in when received by Richards & Conover Hardware Company, and at the time they were shipped back to you?

A. They are in a little better shape than when I was there.

Q. Now don't you know as a matter of fact, they are about twice as rusty as they were at the last trial of this case?

A. No, sir.

Q. You don't know that?

A. I know they are not.

Q. This is the third time you have had them here before this court?

A. The second time?

Q. Didn't you have them here the first time, when there was a non-suit in this case?

A. We had a non-suit but I don't believe we exhibited them to the jury. This is the second time they were exhibited.

Q. Don't you know the first time you had these stoves here they were not rusted at all.

A. I know they were awfully bad rusted. If you will refer to my testimony you will find that the stoves were very rusty.

Q. Now, don't you know, Mr. Thompson, that rust is a progressing affair, that when metal begins to rust, it keeps right on and the longer it goes, the worst it gets?

A. Not if you keep it in the dry.

Q. Do you mean to say that if you take ordinary metal and you start it rusting, that it will just rust some little bit and then quit?

A. No, sir, not on this kind of metal will it continue to rust. You will notice on these stoves the rust has not increased any.

Q. I believe that is all.

(Witness excused)

Thereupon, the plaintiff company rested its case.

[fol. 100] It being the hour of twelve o'clock, noon, the further taking of testimony herein is adjourned until 1:30 p. m.

1:30 p. m. the taking of testimony resumed.

Thereupon the defendant, the Chesapeake & Ohio Railway Company, a corporation, to maintain the issue upon its part, introduced before the court and jury the following witnesses, who testified as follows:

William Reese, sworn, testified on behalf of the defendant company as follows:

Examination by Attorney C. W. Strickling:

Q. Give your name to the jury?

A. William Reese.

Q. What do you do, Mr. Reese?

A. I am foreman of car inspectors for the C. & O. Railway company.

Q. Where?

A. At the C. & O. depot. I am foreman of inspectors.

Q. At what point?

A. Huntington, West Va.

Q. What are your duties, briefly?

A. Why, I inspect every car when necessary before it is placed in movement. I have charge of a bunch of men, a force of men.

Q. What is the purpose of this inspection, Mr. Reese?

A. To see that the car is fit to be loaded before it is loaded.

Q. To see that the car is in fit condition to be loaded?

A. Yes, to see if it is in fit condition to be loaded, to carry a load without being in danger.

Q. The two cars in question in this case, P. M. car No. 80272 and P. M. Car No. 81296, I will ask you whether you inspected these cars?

[fol. 101] A. I inspected these two cars myself.

Q. I mean prior or at the time they were loaded by the Thompson Manufacturing company?

A. Well, it was right at the time they commenced loading the cars. I looked at the cars when they commenced to load the cars and saw whether they were fit.

Q. What was the result of your inspection of these two cars?

A. The cars were perfect, O. K. and comparatively new cars.

Q. The cars were O. K.

A. Yes, sir, so far as visible.

Q. That is all.

Cross-examination: (None.)

By Mr. Simms: I do not care to ask Mr. Reese any questions.

(Witness excused.)

F. C. WILLIAMS, sworn to give evidence on behalf of the defendant, testified as follows:

Examination by Attorney C. W. Strickling:

Q. Your initials are F. C.?

A. Yes, F. C. Williams.

Q. Where do you live, Mr. Williams?

A. Russell, Kentucky.

Q. What is your occupation?

A. Freight conductor for the Chesapeake & Ohio Railway company.

Q. What was your occupation in the month of June, 1920?

A. Freight conductor.

Q. Did you handle P. M. Car No. 80,272 in the month of June, 1920?

A. June 13th.

[fol. 102] Q. Between what points?

A. Huntington and Russell.

Q. That is all.

Cross-examination: (None.)

By Mr. Simms: I do not care to ask Mr. Williams any questions.

H. E. ROADCUP, sworn, testified on behalf of the defendant, as follows:

Examination by Attorney C. W. Strickling:

Q. Your initials and name?

A. H. E. Roadcup.

Q. Where do you live?

A. Russell, Kentucky.
Q. What is your occupation, Mr. Roadcup?
A. Conductor.
Q. For whom?
A. C. & O. Railway company.
Q. What was your occupation in the month of June, 1920?
A. Conductor.
Q. I will ask you to state if you handled P. M. Car No. 81296 in the month of June, in that year?
A. 81286?
Q. Yes?
A. Yes, sir.
Q. Between what points did you handle it?
A. Between Huntington and Russell.
Q. Russell, Kentucky?
A. Yes, sir.
Q. And Huntington, West Virginia?
A. Yes, sir.
Q. What date was that on, Mr. Roadcup?
A. On June 11th.
[fol. 103] Q. 1920?
A. Yes, June 11, 1920.
Q. What train was that?
A. Extra 804.
Q. I will ask you to state whether or not that is the same train——

(Witness interrupts.)

A. Wait a minute, that is 814. Extra 814.
Q. I will ask you to state if that is the same train that Mr. Williams has testified that the other car was handled in?
A. No, sir, Mr. Williams was not on this train.
Q. That is all.

Cross-examination: (None.)

(Witness excused.)

By Mr. Striekling: Mr. W. G. Baribeau is sick and it is agreed by counsel that the evidence of Mr. Baribeau taken at the last trial of this case, may be read and considered as a part of the testimony in this case.

Thereupon, counsel for the defendant read in evidence to the Court and jury the testimony of W. G. Baribeau, taken at the January term, 1922, in the trial of the case of the A. F. Thompson Manufacturing company against the Chesapeake & Ohio Railway company, in the words and figures as follows:

W. G. BARIBEAU, sworn to give evidence on behalf of the defendant, testified as follows:

Examination by Attorney C. W. Strickling:

Q. Where do you live, Mr. Baribeau?
A. Huntington, West Va.
Q. With whom are you engaged,—for whom do you work?
A. Sehon, Stevenson & Company Wholesale Grocery.
Q. Were you with them in the month of June, 1920?
A. I was.
[fol. 104] Q. What did you do out there?
A. Traffic Manager.
Q. Did you know anything about P. M. Car. No. 81296 and P. M. Car No. 80272 coming in there about that time?
A. I don't know whether they are the numbers of the cars or not. P. M. car 80272 and P. M. Car 81296?
Q. Yes?
A. P. M. car 81296 came in on June 7, 1920, from New York, loaded with sugar and P. M. car 80272 came into our plant on June 4, 1920, loaded with green coffee.
Q. Where did they come from?
A. New York.
Q. Was both the coffee and sugar in good condition when received?
A. Absolutely; perfectly.
A. That is all.

Cross-examination: (None.)

(Witness excused.)

By Mr. Strickling: We now desire to introduce in evidence and read to the jury the deposition- of Harry Flowers, John W. Berry, Charles A. McCoy, Herbert C. Gunter and Roy H. Hudson, taken on the 29th day of August, 1921, on behalf of the defendant company, at the law offices of Isaac P. Ryland, First National Bank Building, Kansas City, Missouri, and found beginning on page 198 of the printed record in this case.

Thereupon, counsel for the defendant company read to the jury, said depositions, in the words and figures as follows:

NOTICE TO TAKE TESTIMONY

[fol. 105] [Title omitted]

The above named plaintiff will take notice, that on Monday, the 29th day of August, A. D. 1921, the defendant above named will take the depositions of Harry Flowers, H. Barry, R. Hudson, H. C. Hunter and C. A. McCoy, and sundry witnesses, to be used as evidence in the trial of the above cause, in behalf of the defendant at the Law Offices of Isaac P. Ryland, First National Bank Building, Kansas City, in the County of Jackson, in the State of Missouri,

between the hours of eight o'clock, A. M., and six o'clock, P. M., of said day, and if from any cause the taking of said depositions shall not be commenced, or being commenced shall not be completed on the day aforesaid, the taking of the same will be adjourned from day to day, or from time to time, at the same place, between the same hours, until they are completed.

Fitzpatrick, Campbell, Brown & Davis, Attorneys for Defendant.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions as to time.

Done this — day of ——, A. D. 19—.

—— ——, Attorney for ——.

STATE OF WEST VIRGINIA,
County of Cabell, ss:

This day personally appeared before me the undersigned authority, Emory Quinlan, by me known to be a credible person over the age of twenty-one years, who being duly sworn, deposes and says that [fol. 106] he served the within notice to take depositions on the within named A. F. Thompson Manufacturing Company, a corporation, on the 25th day of August, 1921, by delivering on that date, an exact copy thereof to Harley Thompson, Secretary of said corporation, at the principal place of business of said corporation, in the City of Huntington, Cabell County, West Virginia, the said Harley Thompson residing in the County of Cabell and State of West Virginia, the president or other chief officer of said corporation, and the person appointed pursuant to law to accept service of process for said corporation, not being found within said Cabell County, and being absent from said County at that time.

Emery Quinlan.

Taken, subscribed and sworn to before me this 25th day of August, 1921. My commission expires September 4, 1926. C. W. Strickling, Notary Public in and for Cabell County, West Virginia.

[Title omitted]

DEPOSITIONS OF SUNDRY WITNESSES TAKEN ON BEHALF OF THE DEFENDANT AT KANSAS CITY, MISSOURI, AUGUST 29, 1921

[fol. 107] Depositions of sundry witnesses taken before me, George W. Snyder, a notary public within and for the county of Jackson, in the State of Missouri, pursuant to the annexed notice and at the time and place therein stated, to be read in evidence on behalf of the defendant in an action pending in the Circuit Court of Cabell County, West Virginia, in which A. F. Thompson Manufacturing Company, a corporation, is plaintiff and The Chesapeake & Ohio Railway, a corporation, is defendant, no one appearing on behalf of the plaintiff and Mr. C. W. Strickling, of Fitzpatrick, Campbell Browns & Davis appeared on behalf of the defendant.

HARRY FLOWERS, of lawful age, being by me first duly cautioned and sworn, upon his oath deposes and says as follows:

Direct examination by Mr. Strickling:

1 Q. Just give the stenographer your name.
A. Harry Flowers.
2 Q. Where do you live, Mr. Flowers?
A. I live at 4320 Barnett, in Kansas City, Kansas.
3 Q. That's in Kansas City, Kansas?
A. Yes, sir.
4 Q. What is your occupation?
A. I am now employed as a car oiler.
5 Q. With what railroad?
A. Chicago, Rock Island & Pacific.
6 Q. In what capacity were you employed about August 6th or 7th 1920?
A. Car inspector.
7 Q. And in what capacity were you employed during the month of June, 1920?
A. Car inspector.
8 Q. State briefly what your duties as car inspector were?
A. Why I was to inspect cars and see that they are in good con-
[fol. 108] dition and safe to go over the road.
9 Q. Did you inspect incoming as well as outgoing cars?
A. I did.
10 Q. You were a car inspector of the Chicago, Rock Island & Pacific?
A. Yes, sir.
11 Q. Commonly known as the Rock Island Line?
A. Yes, sir.
12 Q. Did you make any inspection of P. M. Cars Nos. 80272 and 81296?
A. I did.
13 Q. About what time was that?

A. 10:45 P. M.

14 Q. On what date?

A. June 26, 1920.

15 Q. Where was that inspection made?

A. In -he Armourdale Yards.

16 Q. That's in Kansas City?

A. Kansas City, Kansas.

17 Q. Is the Armourdale Yard a terminal of the Rock Island Line?

A. It is.

18 Q. Do you know where these two cars came from?

A. They came in on the St. Louis train, the St. Louis line.

19 Q. That's the Rock Island train from St. Louis?

A. Yes, sir.

20 Q. Was this inspection made immediately after the arrival of this train and these cars?

A. I think it was.

21 Q. Now will you please explain just what procedure you go through in making a car inspection?

A. Well, I start in at the head end or end of the train and look over every car, top, bottom, and underneath and all sides and ends, and on top.

[fol. 109] 22 Q. On top and note all defects?

A. On top and note all defects and make a record of same.

23 Q. That is, do I understand that you make a record if there are defects?

A. Yes, sir.

24 Q. If there are no defects do you make any record?

A. We make no record, no, sir.

25 Q. Now as to these two particular cars, did you inspect them in the manner that you have indicated above?

A. Yes, sir.

26 Q. Did you find any defects of any character in those two cars?

A. According to our record, we did not.

27 Q. If there had been any defects they would have been noted on your record?

A. Yes, sir.

28 Q. After you made this inspection of these cars, what then became of them?

A. I couldn't say; that there is done by the transportation department then.

29 Q. In answer to one of my questions, you made some reference to a record not indicating that there was any defect in this car. Are you referring to and refreshing your memory from the original record made by you at the time this inspection was made?

A. Yes, sir.

30 Q. Was that record made entirely in your handwriting?

A. Yes, sir.

31 Q. And was made at the time this inspection you speak of was made?

A. Yes, sir.
32 Q. In what train did these cars arrive on June 26th?
A. Train 95 from St. Louis.
33 Q. That is all.

Harry Flowers.

[fol. 110] Subscribed and sworn to before me this 14 day of September, 1921. My commission expires October 7, 1923. George W. Snyder, Notary Public within and for Jackson County, Missouri. (Notary Public Seal.)

Deposition of John W. Berry, taken at the law office of Isaac R. Ryland, First National Bank Building, Kansas City, Missouri, August 29, 1921, and which *are* in the words and figures as follows:

JOHN W. BERRY, of lawful age, being by me first duly cautioned and sworn, upon his oath deposeth and saith as follows:

Direct examination by Mr. Strickling:

1 Q. Give your name, please?
1. — John W. Berry.
2 Q. Where do you live?
2. — 262 South 11th Street, Kansas City, Kansas.
3 Q. What is your occupation?
A. Safety appliance man for the Rock Island.
4 Q. What was your occupation on or about June 27, 1920, or the entire month of June, 1920?
A. Safety appliance man.
5 Q. And have you been continuously since that time?
A. Yes, sir.
6 Q. Employed in that capacity?
A. Yes, sir.
7 Q. And you are employed, I understand, by the Chicago, Rock Island & Pacific Railway Company?
A. Yes, sir.
8 Q. Commonly known as the Rock Island Line?
A. Yes, sir.
9 Q. What, in brief, are your duties as safety appliance man with [fol. 111] the Rock Island Railway?
A. Well, sir, my duties are to do all the light repairs that can be made in the train yard, to save switching the car to the rip track, or repair track.
10 Q. Do your duties involve the inspection of any cars?
A. Well, sir, there's an inspector and safety appliance man, they work together, and the safety appliance man inspects one side of the car and the inspector the opposite side.
11 Q. So that you do make inspection of the cars as they come in.
A. Yes, sir.

12 Q. Did you have occasion to inspect P. M. Cars Nos. 80272 and 81296?

A. I did.

13 Q. On what date was that?

A. That was June 26th, according to our train sheet, June 26th, 1920.

14 Q. Describe the procedure that you adopted in making this inspection?

A. Well, as soon as the train arrives in the yards, the engine is cut off and taken to the round-house and, of course, we proceed then to inspect the train, commencing at the head end of the train, that is the car next to the engine, and we inspect all the cars; that is, all of the outside, we don't look in a car unless it's an empty. If it's a sealed car, we inspect everything on the outside from top to bottom, and if there are any defects, we mark them on the train sheet, and if there are none, all we have is just the car number and initials. That is considered then that the car is O. K.

15 Q. This was the procedure which you went through in inspecting these two cars, was it?

A. Yes, sir.

16 Q. Did you find anything wrong with them?

A. According to our record there was nothing wrong with the cars; that is nothing shows against them.

17 Q. You are refreshing your memory now from the record [fol. 112] covering that inspection of these two cars?

A. Yes, sir.

18 Q. And by whom was that record made?

A. Made by Mr. Flowers.

19 Q. That's the Mr. Flowers that has just testified here?

A. Yes, sir; he is the man that did the writing and made out that report.

20 Q. You are familiar with his handwriting, are you?

A. Yes, sir.

21 Q. Do you recognize that record as being in his handwriting?

A. I do.

22 Q. It is correct, is it?

A. Yes, sir, it is.

23 Q. And it is a character of record that is required to be kept by the railroad company?

A. Yes, sir.

24 Q. Do you know where these cars came from?

A. They came in off of the St. Louis Line.

25 Q. Of the Rock Island?

A. Yes, sir.

26 Q. How long have you been doing this safety appliance and inspection work for the Rock Island?

A. Since 1917.

27 Q. Continuously?

A. Yes, sir.

28 Q. I believe that's all.

John W. Berry.

Subscribed and sworn to before me this 5th day of September, A. D. 1921. Georgie W. Snyder, Notary Public within and for Jackson County Missouri. My commission expires October 7, 1923. (Seal.)

[fol. 113] Deposition of Charles A. McCoy, taken at the law offices of Isaac P. Ryland, First National Bank Building, Kansas City, Missouri, which *are* in the words and figures as follows:

CHARLES A. MCCOY, of lawful age, being by me first duly cautioned and sworn, upon his oath deposes and says as follows:

Direct examination by Mr. Strickling:

1 Q. Give your name to the stenographer?
A. Charles A. McCoy.
2 Q. Where do you live?
A. 514 Norton Avenue, Kansas City.
3 Q. Kansas City, Missouri?
A. Kansas City, Missouri.
4 Q. What is your occupation?
A. Loss and damage inspector.
5 Q. Of what?
A. The Western Weighing and Inspection Bureau.
6 Q. How long have you been Loss and Damage Inspector of the Western Weighing and Inspection Bureau?
A. Since November 1, 1918.
7 Q. And what did you do prior to that time?
A. I was assistant warehouse foreman—no, I was in the Transit Department of the Western Weighing & Inspection Bureau before that.
8 Q. Were you Loss and Damage Inspector of the Western Weighing and Inspection Bureau in the month of August, 1920?
A. I was.
9 Q. Just state briefly what your duties as such Loss and Damage Inspector were at that time?
A. The inspection of damaged or pilfered shipments, in either carload or less than car loads, after their delivery to consignee.
[fol. 114] 10 Q. Did you handle inspection for the Rock Island and did you in August, 1920?
A. I did.
11 Q. Did you handle for any other roads?
A. For all lines into Kansas City.
12 Q. Now the A. F. Thompson Manufacturing Company brought a suit in the Circuit Court of Cabell County, West Virginia against the Chesapeake & Ohio Railway Company, alleging that certain stoves shipped to the Richards & Conover Hardware Company at Kansas City, Missouri were damaged in transit. Did you have any connection with the stoves contained in this shipment.

A. I inspected some of them.

13 Q. About what time was that inspection made?

A. Made on August 6, 1920.

14 Q. What was the occasion for making that inspection?

A. The shipper, Mr. A. F. Thompson, requested the Inspection, claiming the stoves had been damaged in transit.

15 Q. He made that request of your Bureau?

A. No; the request came from the Rock Island local office.

16 Q. In other words, he made the request of the Rock Island and the Rock Island in turn asked you to make that inspection?

A. Yes, sir.

17 Q. And did you make that inspection?

A. I did.

18 Q. In a few words, state just what you did in making that inspection?

A. On arriving at the Richards & Conover warehouse, I examined several crates and several cartons containing stoves.

19 Q. Just a moment, how were these stoves packed?

A. Packed in crates and cartons.

20 Q. When you say "crates," do you mean open crates?

A. Yes.

21 Q. And when you say "cartons," describe what sort of a package that was?

[fol. 115] A. An enclosed fibre-board box.

22 Q. Sealed?

A. Yes; shipping containers.

23 Q. Now go on and tell what you did with your inspection?

A. I found parts of the stoves, on careful examination, to be rusted.

24 Q. Was that condition true also with respect to the stoves in the paper cartons or paste-board cartons, as well as the stoves in the open crates?

A. Yes, sir.

25 Q. Was there anybody with you at the time you made that inspection?

A. Mr. A. F. Thompson.

26 Q. Of Huntington?

A. Of Huntington, West Virginia, and Mr. Gunter of the C. R. I. & P. Railroad, and Mr. Eads, and the manager of the stove department of Richards & Conover.

27 Q. Richards & Conover Hardware Company, that's the consignee of this shipment?

A. Yes, sir.

28 Q. Was anything done at that time toward protecting those stoves from the rust or corrosion?

A. The shipper's representative, Mr. Thompson, had a bottle of paraffine oil, with which he was attempting to remove the rust.

29 Q. When you made this inspection on August 6, 1920, was that the first inspection that was called for by the consignee or shipper?

A. Yes, sir.

30 Q. And that was how long after the shipment had been delivered to the consignee?

A. About five weeks.
31 Q. The shipment was delivered when?
A. June 27th.
32 Q. And this inspection was not called for or made until [fol. 116] August 6th?
A. August 6th; that's right.
33 Q. When you made this inspection on August 6th, what time first—what time did you first go there?
A. In the morning between ten and eleven o'clock.
34 Q. And who was with you at that time?
A. Mr. A. F. Thompson.
35 Q. Anybody else?
A. The manager of the stove department of Richards & Conover; I don't recall whether one of the traffic managers was with us at that time or not.
36 Q. And how long did you stay there that morning?
A. About forty minutes.
37 Q. And did you go back again in the afternoon?
A. Yes, sir.
38 Q. Who was with you then?
A. Mr. Gunter, of the C. R. I. & P. Railroad Company, Mr. Thompson, and the manager of the stove department of Richards & Conover Hardware Company.
39 Q. And in these two inspections on these two trips, you found the conditions that you have spoken of above?
A. Yes, sir.
Q. That is all.

Charles A. McCoy.

Subscribed and sworn to before me this 5th day of September, A. D. 1921. Georgie W. Snyder, Notary Public within and for Jackson County, Missouri. My commission expires October 7, 1923. (Seal.)

Deposition of Herbert C. Gunter, taken at the law offices of Isaac P. Ryland, First National Bank Building, Kansas City, Missouri, which [fol. 117] *are* in the words and figures as follows:

HERBERT C. GUNTER, of lawful age, being by me first duly cautioned and sworn, upon his oath deposes and says as follows:

Direct examination by Mr. Strickling:

1 Q. Give your name to the stenographer?
A. Herbert C. Gunter.
2 Q. Where do you live, Mr. Gunter?
A. Eldon, Missouri.
3 Q. Where were you living in August, 1920?
A. Eldon, Missouri, was my headquarters.
4 Q. What is your occupation?

A. I am station agent now.

5 Q. And what was your occupation in the summer of 1920, particularly the month of August?

A. Loss and Damage Inspector in the Freight Claim Department of the Rock Island.

6 Q. That's the Chicago, Rock Island & Pacific Railway?

A. Yes, sir.

7 Q. What, briefly, were your duties in that capacity?

A. Making inspections of damaged shipments, looking after damaged goods at wrecks, or sell perishable goods, if necessary, and make claim investigations.

Q. 8. Mr. A. F. Thompson, or the A. F. Thompson Manufacturing Company of Huntington, West Virginia, has brought a suit against the Chesapeake & Ohio Railway Company, involving the shipment of two carloads of stoves, consigned to Richards & Conover Hardware Company at Kansas City, Missouri. Did you have any connection with or make any inspection in connection with that shipment?

A. I was notified by the local office and made an inspection of the [fol. 118] shipment.

9 Q. By whose local office?

A. The Rock Island's local office; the Rock Island Freight office.

10 Q. And that notification came how?

A. Through the claim clerk.

11 Q. And what did you then do, after seeing the notification?

A. I went to the office of the Western Weighing and Inspection Bureau and found the chief inspector, Mr. McCoy.

12 Q. That's the Mr. McCoy, who has just testified here?

A. Yes.

13 Q. And what did you then do?

A. And we then went to the Richards & Conover Hardware Company.

14 Q. And who did you see when you got there?

A. Mr. A. F. Thompson, of Huntington, West Virginia, and Mr. Bundy, the traffic manager of Richards & Conover Hardware Co.

15 Q. And what did you do——

A. (Interrupting.) He was the traffic manager.

16 Q. What did you do then?

A. We went to the building where he had the stoves stored, and made an inspection of a number of the stoves.

17 Q. And in what condition did you find them?

A. We found some of them rusty.

18 Q. Now you were accompanied on this inspection trip by Mr. Bundy, Mr. Rhompson and Mr. McCoy?

A. Yes, sir.

19 Q. How were these stoves packed?

A. In crates and paper cartons.

20 Q. That is, some were in open straight crates and others were in sealed paper cartons?

A. Yes, sir.

21 Q. And when you made this inspection, Mr. Thompson, Mr. [fol. 119] Bundy, and Mr. McCoy and you all looked at the stoves together?

A. Yes, sir, a number of them.
22 Q. Now was anything done at that time for the protection of these stoves from rust and corrosion?
A. Mr. Thompson had a bottle of paraffine oil and had a man applying it to the stoves.
23 Q. And that was being done there at that time?
A. Yes, sir.
24 Q. Now what date was this inspection made on, if you remember?
A. On August 6th.
Q. 1920?
A. Yes, sir.
25 Q. That was how long after this shipment had arrived in Kansas City?
A. About five weeks.
26 Q. The shipment arriving when?
A. June 27th.
27 Q. You hadn't received any notice calling for an inspection before August 6th?
A. No, sir.
28 Q. What time of day was it when you went there on August 6th to make the inspection?
A. It was about two-thirty in the afternoon when we reached the hardware store.
29 Q. That was the first time you had been there?
A. Yes, sir.
30 Q. Was your information that anybody else had been there inspecting the day, that day before you got there?
A. I didn't understand at the time, no: I didn't so understand.
31 Q. I believe that's all.

H. C. Gunter.

Subscribed and sworn to before me this 7th day of September, [fol. 120] 1921. Georgie W. Snyder, Notary Public within and for Jackson County, Missouri. My commission expires October 7, 1923. (Seal.)

Depositions of Roy H. Hudson, taken at the law offices of Isaac P. Ryland, First National Bank Building, Kansas City, Missouri, which *are* in the words and figures as follows:

Roy H. Hudson, of lawful age, being by me first duly cautioned and sworn, upon his oath disposes and says as follows:

Direct examination by Mr. Strickling:

1 Q. State your name, residence and occupation.
A. Roy H. Hudson; 3215 East 26th Street Terrace.
2 Q. Kansas City, Missouri?

A. Yes, sir; I am car inspector for the Kansas City Southern Railway.

3 Q. How long have you been connected with the Kansas City Southern as car inspector?

A. Well, I have been inspecting about fourteen years.

4 Q. Were you acting in that capacity for the Kansas City Southern about June 26th and 27th of 1920?

A. Yes, sir.

5 Q. When you speak of the Kansas City Southern, you mean the Kansas City Southern Railway Company?

A. Yes, sir.

6 Q. Did you have occasion, on or about that time, to handle P. M. Cars numbers 80,272 and 81,296?

A. Yes, sir.

7 Q. What did you do with reference to those cars?

A. Inspected them is all.

[fol. 121] 8 Q. Will your describe briefly, the procedure you adopted in making that inspection?

A. Do you mean how I inspected them?

9 Q. How you went about it, yes, sir.

A. You see when one of us works alone, we go down on one side and then come back on the other side, and we look underneath and the ends and the sides as we go down and then go back over the roofs.

10 Q. Now at the particular time you inspected these two cars, were you alone or working with somebody?

A. No; myself.

11 Q. Then did you yourself make a complete inspection of these two cars at that time?

A. Yes, sir.

12 Q. What did you find as a result of your inspection?

A. Nothing; the cars were O. K.

13 Q. The cars were O. K?

A. Yes, sir.

14 Q. So there wasn't anything wrong with them whatever, as far as you could see?

A. No sir; nothing as far as I could see.

15 Q. They were in good condition?

A. Yes, sir.

16 Q. Where had those cars come from, do you know?

A. No; I know we received them from the Rock Island.

17 Q. They were turned over to you, the Kansas City Southern, by the Rock Island?

A. Yes, sir.

18 Q. Now what day was it you made this inspection that *that* you speak of?

A. June 27, 1920.

19 Q. That is all.

Roy H. Hudson.

[fol. 122] Subscribed and sworn to before me this 5th day of September, A. D. 1921. Georgie W. Snyder, Notary Public within and for Jackson County, Missouri. My commission expires October 7, 1923. (Seal.)

THE STATE OF MISSOURI,
Jackson County, ss:

I, Georgie W. Snyder, a Nortary Public in and for the County and State above-named, duly commissioned and qualified, do hereby certify that the above named Harry Flowers, John W. Berry, Charles A. McCoy, Herbert C. Gunter and Roy H. Hudson, were by me first severally sworn to testify the truth, the whole truth and nothing but the truth and that the depositions by th-m *respectfully* subscribed as above set forth, were reduced to writing by myself, and were subscribed by the said witnesses, respectively, in my presence; that said depositions were duly taken by me pursuant to and at the time and place and within the hours specified in the notice hereto attached, and that I am not counsel, attorney or relative of either party, or otherwise interested in the event of this suit; and was at the time of so taking the said depositions, a Notary Public duly commissioned, qualified and acting in said County and State; and I further certify that my fee for taking the said depositions are $10.15, that the same is just and has been paid to me by the defendant.

In testimony whereof, I have hereunto set my hand and official seal this 15th day of September, A. D., 1921.

Georgie W. Snyder, Notary Public within and for Jackson County, Missouri. My commission expires October 7, 1923. (Seal.)

By Mr. Strickling: We rest, your Honor.

[fol. 123] ARGUMENT OF COUNSEL

Thereupon, the defendant company rested its case.

And this was all the evidence adduced upon the trial of this case, either by the plaintiff company or the defendant company.

By Mr. Strickling: The defendant now moves the Court to strike out the evidence of the plaintiff and to direct a verdict for the defendant, on the grounds that there is no proof showing that the claim has been filed within four (4) months, or any other time, with the initial and delivery carrier after the delivery of the shipment of stoves involved in this case, as required by the conditions in the two bills of lading under which the shipment of stoves moved, which Bills of Lading are introduced in evidence as Plaintiff's Exhibits No. 1 and No. 2, respectively, said shipments being Interstate shipments, and as such, subject to the laws of the United States in such cases made and provided.

By the Court: The motion will be overruled.

By Mr. Strickling: The defendant, the Chesapeake & Ohio Railway company now excepts to the ruling of the court in denying the foregoing motion, on the grounds that said ruling denies the right reserved to this defendant under the laws of the United States, and is a ruling contrary to the laws of the United States against this defendant, in such case made and provided, and denies this defendant a right reserved to it under the laws of the United States.

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,
County of Cabell, To wit:

I, Austin M. Sikes, Official Reporter of the Circuit Court of Cabell county, West Virginia, do hereby certify that the foregoing is a true [fol. 124] and correct transcript and is all the testimony adduced either by the plaintiff corporation or defendant corporation upon the trial of the case of the A. F. Thompson Manufacturing company, a corporation, against the Chesapeake & Ohio Railway company, a corporation.

Given under my hand this 10th day of July, 1923.
Austin M. Sikes, Official Reporter.

JUDGE'S CERTIFICATE

STATE OF WEST VIRGINIA,
County of Cabell, To wit:

I, Thos. R. Shepherd, Judge of the Circuit Court of Cabell county, West Virginia, do hereby certify that Austin M. Sikes is the Official Reporter of the Circuit Court of Cabell county, West Virginia; that the foregoing is a correct transcript of the testimony in the case of the A. F. Thompson Manufacturing company, a corporation, against the Chesapeake & Ohio Railway company, a corporation, as the same was taken down in shorthand notes and later transcribed and furnished to me by said Reporter.

Given under my hand this 21st day of July, 1923.
Thos. R. Shepherd, Judge Circuit Court of Cabell County, West Virginia.

And this was all the evidence introduced in the trial of this case, and after all the evidence had been adduced before the jury, both on behalf of the plaintiff company and the defendant company, the plaintiff, by counsel tendered to the Court its instructions, in writing, marked "Court's Instructions" two instructions, in the words and figures as follows:

[Title omitted]

[fol. 125] PLAINTIFF'S REQUESTED INSTRUCTIONS TO JURY

The Court instructs the jury that it is the law that a Railway company or common carrier is an insurer of freight delivered to it for transportation, except where the damage or injury to said freight is caused by what is defined as an act of God, or by the public enemy, or caused by the inherent nature of some defect in the freight which is injured or damaged, and that if the jury believe from the evidence in this case that plaintiff delivered a shipment of stoves to the Chesapeake & Ohio Railway company in good condition, for shipment to a consignee at Kansas City, Missouri, and that an interstate bill of lading was issued by said Railway Company for said shipment and that when said shipment arrived at Kansas City that a number of said stoves were found to be damaged or injured, that under the law the Chesapeake & Ohio Railway Company, being the initial carrier, is liable for such damage, as the jury may believe the evidence shows were sustained by the plaintiff by reason of the injury to said stoves, unless the defendant can show by a preponderance of the evidence that the said stoves were damaged either by an act of God, or by the public enemy, or by some inherent defect resulting from the composition and nature of the stoves themselves, or by a natural infirmity or vice inherent in said stoves at the time of carriage.

And the Court further instructs the jury that in this case, that an act of God is defined to be that which is occasioned exclusively by the violence of nature, by that kind of force of the elements which human ability could not have foreseen or prevented, such as lightning, tornado, sudden squall of wind and the like, that an act of the public enemy is defined to be an act done during the course of a war by a foreign nation with which the United States is at war.

[fol. 126] (Objected to by C. W. S. C. D. N.)

Given. T. R. S.

No 2

The Court further instructs the jury that if they believe from the evidence in this case that the stoves shipped by plaintiff to Kansas City, Missouri, were in good condition when delivered to the Chesapeake & Ohio Railway Company, and were in a damaged condition when delivered at Kansas City, that then the burden of proof is on the defendant in this case, to prove that the injury to the stoves was caused either by an act of God, by the public enemy, or arose from the nature of the stoves by reason of the composition of the stoves, or by a natural infirmity or vice inherent in said stoves at the time of carriage, and that the defendant must prove that such injury was caused by the nature and composition of the stoves, by a preponderance of the evidence, and the jury are the sole judges of the weight of the evidence and of the credibility of the witnesses, and

unless the jury believe from the evidence that the defendant has established by a preponderance of the evidence that the stoves were injured as a result of some defect in the composition of the stoves, or by a natural infirmity or vice inherent in said stoves at the time of carriage, or by an act of God or by the public enemy, they may find for the plaintiff such damages as they may believe the evidence establishes in this case.

(Objected to. C. W. S. C. N. D.)

(Given. T. R. S.)

To the giving of said instructions and each of them on behalf of [fol. 127] the plaintiff company, counsel for the defendant objected, and the Court overruled defendant's objection and gave to the jury the instructions marked "Court's Instructions No. 1 and No. 2" to which ruling and action of the court in giving to the jury the said two instructions as herein set out, counsel for the defendant, objected and excepted.

Thereupon, counsel for the defendant, tendered to the Court its four instructions in writing, in the words and figures as follows, and marked "Defendant's Instruction No. 1, No. 2, No. 3 and No. 4.

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

[Title omitted]

Defendant's Instruction No. 1

The Court instructs the jury to find for the defendant.

(Refused. T. R. S.)

[Title omitted]

Defendant's Instruction No. 2

The Court instructs the jury that while, as a general rule, a common carrier is an insurer of goods delivered to it for transportation, it is not an insurer in all cases and that it is not an insurer where goods, if damaged or injured, are damaged or injured from some cause or vice inherent to the goods themselves, and that if the jury believe from the evidence that the rusting of the stoves shipped by the A. F. Thompson Manufacturing Company was caused from something inherent to the stoves themselves, without negligence on the part of the carrier, then they shall find for the defendant.

[fol. 128] (Objected to by Plaintiff.)

(Given. T. R. S.)

[Title omitted]

Defendant's Instruction No. 3

The Court instructs the jury that by the term inherent as applied to a condition of a shipment delivered to a carrier for transportation, is meant something within the construction of that shipment or something which existed in relation to that shipment at the time it was delivered to the carrier for transportation.

(Given. T. R. S.)

[Title omitted]

Defendant's Instruction No. 4

The Court instructs the jury that under bills of lading issued in this case plaintiff was required, as a condition precedent to instituting suit on any claim arising under such shipment, to file a claim with either the initial or delivering carrier within four months after the date of delivery of the shipment and that if the plaintiff failed to file such claim within the time specified, then they should find for the defendant.

Refused. T. R. S.)

[fol 129] COURT'S INSTRUCTIONS TO JURY.

To the giving of said instructions and each of them, counsel for the plaintiff company objected, and the Court overruled the objection as to Defendant's Instruction No. 2 and Defendant's Instruction No. 3 and gave said two instructions, No. 2 and No. 3, to the jury; but the Court sustained plaintiff's objection to Defendant's Instruction No. 1 and Defendant's Instruction No. 4 and refused to give said instructions No 1 and No. 4 to the jury, to which ruling and action of the court in refusing to give to the jury Defendant's Instructions No. 1 and No. 4, counsel for the defendant, objected and excepted.

Thereupon, after the evidence had been adduced to the jury, on behalf of the plaintiff company and the defendant company, the argument of counsel, and the instructions of the Court, the jury retired to their room to consider of their verdict and after a time returned into open court, with the following verdict:

VERDICT.

"We, the jury, find for the plaintiff, and assess damages at $4,264.50.

(Signed) A. L. Withrow, Foreman"

The jury was then discharged from the further consideration of the premises.

ORDER OVERRULING MOTION TO SET ASIDE JUDGMENT

Thereupon, the defendant, by counsel, moved the Court to set aside the verdict of the jury rendered herein, and to award it a new trial, because the same is contrary to the law and the evidence, and because the same is contrary to, in conflict with, and repugnant to the laws and the Constitution of the United States, and is against the right claimed by the defendant under the laws of the United States, and deprives the defendant of the right secured by the laws and constitution of the United States and by the interstate bills of lading under which the shipments involved in this cause moved, and for other reasons then assigned; which motion the Court overruled, to which ruling and action of the court in refusing to set aside said [fol. 130] verdict and grant the defendant a new trial, the defendant, by counsel, then and there excepted, and to save itself the benefit of the said objection and exceptions, and likewise, of all its other objections and exceptions herein noted, presents this, its bill of exceptions No. 1, and asks that the same be signed, sealed, enrolled and certified to the Clerk of the Circuit Court of Cabell County, West Virginia, as a part of the record in this cause, all of which is accordingly done this 21st day of July, 1923, and within thirty days from the final adjournment of the term of the Circuit Court of Cabell county, West Virginia, at which the final judgment herein was rendered, which adjournment was taken on the 23rd day of June, 1923.

(Signed) Thos. R. Shepherd (Seal.) Judge, Circuit Court of Cabell County, West Virginia.

Defendant's Bill of Exceptions No. 1

Filed July 21st, 1923.

G. R. Seamonds, Clerk, Circuit Court of Cabell County, West Virginia.

[Title omitted]

JUDGMENT

This day came the plaintiff, by its attorneys, and the defendant, by its attorneys, and thereupon the defendant again for plea in this behalf says, that it did not undertake and promise as in the declaration alleged, and of this it puts itself upon the country, and the plaintiff doth the like, and issue is thereon joined.

[fol. 131] Thereupon came the jury, to-wit, A. L. Withrow and eleven other good and lawful men duly sworn, empanelled and sworn to well and truly try the issue joined between the parties and a true verdict render according to the evidence.

And thereupon doth the plaintiff and the defendant introduce their evidence, at the conclusion of all of which the defendant, by it counsel, moved the court to strike out the evidence of the plain-

tiff and to direct a verdict for the defendant, for this: that the evidence in this cause fails to show that proof of claim in writing was filed with the initial or delivering carrier within four (4) months from the date of delivery of the shipments involved herein, which shipments were inter-state shipments, and as such, subject to the law of the United States in such case made and provided, which laws require that claim be filed in writing with either the initial or delivering carrier within four (4) months from the date of delivery of the shipment involved herein under the Interstate contracts under which said shipments moved, and for other reasons then assigned, which motion the Court overruled and the defendant excepted, because the ruling of the court deprives it of a right secured to it under the laws and constitution of the United States, and such decision of the Court in overruling said motion is against the right claimed by said defendant under the laws and constitution of the United States, and is repugnant to and in conflict with the laws of the United States, and deprived your petitioner of the right secured by the laws and constitution of the United States, and by the Interstate Bills of Lading under which the shipments involved in this case moved, and for other reasons assigned at bar.

Thereupon, after hearing the argument of counsel and the instructions of the Court, the jury retired to their room to consider of their verdict and after a time returned into open court with a verdict in the words and figures following:

"We the jury, find for the plaintiff and assess damages at $4,264.50.

[fol. 132] (Signed) A. L. Withrow, Foreman."

The jury was then discharged from the further consideration of the premises.

Thereupon the defendant moved the court to set aside the verdict of the jury rendered herein, and to award it a new trial because the same is contrary to the law and the evidence, and b-cause the same is contrary to, in conflict with, and repugnant to the laws and the constitution of the United States, and is against the right claimed by the defendant under the laws of the United States, and deprives the defendant of the right secured by the laws and constitution of the United States and by the Interstate Bills of Lading under which the shipments involved in this cause moved, and for other reasons then assigned; which motion the court overruled and the defendant excepted.

It is therefore considered by the Court that the plaintiff, A. F. Thompson Manufacturing Company, a corporation, do recover of and from the defendant, the Chesapeake and Ohio Railway Company, a corporation, the sum of Four Thousand Two Hundred and Sixty Four Dollars and Fifty Cents ($4,264.50) the amount of the verdict of the jury hereinabove rendered with interest at 6 per cent until paid, and in addition thereto, its costs in and about the prosecution of this suit expended, including the sum of Ten Dollars ($10.00) as allowed by law.

ORDER EXTENDING TIME

Memorandum

Be it remembered that the defendant having expressed a desire to apply to the Supreme Court of Appeals of West Virginia for writ of error from, and supersedeas to, the judgment aforesaid,

It is ordered that the defendant be allowed thirty (30) days from the rising of this court to prepare and present and have made a part of the record its proper bills of exception and that this judgment be [fol. 133] stayed for a period of sixty (60) days upon the giving of a bond in the penalty of One Thousand Dollars ($1,000.) as required by law.

Endorsed thereon as follows:

Enter
T. R. Shepherd,
Judge.

IN CIRCUIT COURT OF CABELL COUNTY

ORDER SETTLING BILL OF EXCEPTIONS

[Title omitted]

On this the 21st day of July, 1923, and within thirty days from the final adjournment of the term of the Circuit Court of Cabell County, West Virginia, at which the final judgment herein was rendered, the said term having finally adjourned on the 23 day of June, 1923, came again the defendant, by its attorneys and tendered to the court its bill of exceptions to certain rulings of the court which were made in said cause upon the trial thereof, marked for identification

"A. F. Thompson manufacturing
Company, a corporation,
vs) In Assumpsit:
The Chesapeake & Ohio Railway
Campany, a corporation,
Defendant's Bill of Exceptions No. 1"

and asks that its said Bill of Exceptions be signed, sealed, saved to it, and made a part of the record in this case, and certified to the Clerk of the Circuit Court of Cabell County as such, which said Bill of Exceptions having been seen and inspected by the Court, and found to be true and correct, is this day settled, signed, sealed, and enrol-ed by the Judge of the Circuit Court of Cabell County, and the [fol. 134] same is now hereby certified to the Clerk of the Circuit Court of Cabell County, West Virginia, and it is orderee that the same be made a part of the record in this case, which is accordingly done, in vacation, this 21st day of July, 1923.

Thos. R. Shepherd, Judge Circuit Court of Cabell County, West Virginia. (Seal.)

To the Clerk of the Circuit Court of Cabell County, West Virginia:

Enter the foregoing order as a vacation order.

Thos. R. Shepherd, Judge.

IN CIRCUIT COURT OF CABELL COUNTY

CLERK'S CERTIFICATE

I, G. R. Seamons, Clerk of the Circuit Court of Cabell County and State aforesaid, do hereby certify that the foregoing is a true and correct transcript of the record in the case of A. F. Thompson Manufacturing Company, vs. The Chesapeake & Ohio Railway Company as the same appears of record in my office.

Given under my hand and the seal of the Court this 8th day of September, 1923,

G. R. Seamond, Clerk Circuit Court Cabell County, W. Va.

(Seal.)

Printed Oct. 10, 1923. (Printer's fee for petition, record, index and cover $—.)

Compared Feb. 19, 1924.

[fol. 135] IN SUPREME COURT OF APPEALS OF WEST VIRGINIA

[Title omitted]

4996

A. F. THOMPSON MANUFACTURING COMPANY, Plaintiff Below, Defendant in Error,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant Below, Plaintiff in Error

Upon a Writ of Error and Supersedeas to Judgment of the Circuit Court of Cabell County rendered on the 6th day of June, 1923

ARGUMENT AND SUBMISSION—Feb. 20, 1924

This day came the plaintiff in error, by Fitzpatrick, Brown & Davis and C. W. Strickling, its attorneys, and the defendant in error, by Simms & Staker, its attorneys, and this case was fully heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel thereon and is submitted for decision.

IN SUPREME COURT OF APPEALS OF WEST VIRGINIA

[Title omitted]

Upon a Writ of Error and Supersedeas to a judgment of the Circuit Court of Cabell County, rendered on the 6th day of June, 1923

JUDGMENT—March 4, 1924

The Court, having maturely considered the transcript of the rec-
[fol. 136] ord of the judgment aforesaid and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said judgment. It is therefore considered by the Court that the judgment of the Circuit Court of Cabell County, rendered in this case on the 6th day of June, 1923, be and the same hereby is affirmed, and that the defendant in error do recover from the plaintiff in error its costs about its defense in this Court in this behalf expended and damages according to law: all of which is ordered to be certified to the Circuit Court of Cabell County.

The decision of points in the foregoing case, as the same appears from the syllabus and written opinion prepared by Judge Lively, was concurred in by Judges Miller, Meredith, McGinnis and Litz.

The syllabus and written opinion filed in the foregoing case is in the words and figures following:

[fol. 137] IN SUPREME COURT OF APPEALS OF WEST VIRGINIA

[Title omitted]

Cabell County. Affirmed

Lively, Judge

1. Where goods in first class condition are delivered to a common carrier for interstate shipment and are delivered by it to the consignee in a damaged condition, the presumption of law is that the goods were damaged by the carelessness or negligence of the carrier; and the Cummins amendment to the Carmack amendment to the Interstate Commerce Act, (Barnes' Federal Code sec. 7976; U. S. Comp. Stat. sec. 8604-A), dispensing with notice and filing of claim by the shipper with the carrier for damages to the goods while in transit caused by the carrier's negligence, before suit can be maintained, does not abolish this presumption of law, and does not require the shipper to prove by positive evidence that the carrier, in fact, was negligent.

2. The Cummins amendment above referred to does not require the shipper, as a condition precedent to maintaining his suit, to give notice of his claim and file with the carrier his claim for damages to goods in interstate shipment which have been damaged in transit by the carelessness and negligence of the carrier.

[fol. 138] LIVELY, Judge:

The railway company prosecutes this writ of error to a judgment rendered against it in favor of the A. F. Thompson Manufacturing Company, in the circuit court of Cabell county, on June 6, 1923; which judgment is the result of a new trial awarded by this court, when the case was before it on a former writ. See Thompson Mfg. Co. v. Ry. Co., — W. Va., —; 115 S. E., 77.

The suit is for damages occasioned by negligence to a shipment of stoves consigned by plaintiff to Richards & Conover Hardware Co. and delivered to defendant company on June 9, 1920. The bills of lading were put in evidence; and while it appears that they are old forms which were in use prior to the enactment of the Cummins amendment to the Carmack amendment to the Interstate Commerce Act (Barnes' Fed. Code, sec. 7976; U. S. Comp. Stats. sec. 8604-A), both parties agree that the contract is controlled by the Cummins amendment with reference to giving notice of and filing of claims with the railroad company, for loss of goods or damage thereto.

The stoves were made of sheet metal and about 20% of them were packed in pasteboard cartons sealed with gummed paper, and about 80% of them were wrapped in heavy paper and enclosed in ordinary open packing crates. The stoves were new, in good condition and not rusted when loaded. They were placed in first-class weather-tight box cars without delay and without loss or damage in loading, and were delivered to the consignee within a reasonable time, the box cars then being in first-class condition, and the original seals thereon unbroken. Upon being opened for unloading, the consignee discovered that seven hundred and seventy-eight of the stoves were rusted beyond commercial use. The remainder were accepted and paid for. Later, this suit was instituted for damages to the stoves which were rusted, it being charged that the damage was occasioned [fol. 139] by the negligence and carelessness of the carrier while in transit. Plaintiff, having proved delivery of the stoves to the defendant in good condition, properly packed, and delivery to the consignee in the rusted and damaged condition above set out, rested its case. Defendant proved the first-class condition of the cars, the placing of the shipment therein and its delivery, and the arrival of the cars in good condition with the seals unbroken at their destination. No attempt was made by either party to show the cause of the damage to the stoves. The cause was sought to be determined in the former trial, but not in this trial. The jury returned a verdict for $4,264.50, on which judgment was entered. Motion for new trial was made and overruled.

While several grounds of error are assigned in the petition, the railway company relies upon the failure of plaintiff to give notice of,

and file its claim within the time required by the provisions of the Carmack amendment to the Cummins amendment to the Interstate Commerce Act. It offered a peremptory instruction to find in its favor; and by its instruction No. 4 asked the court to instruct the jury that under the bills of lading the plaintiff was required, as a condition precedent to institution of suit on any claim arising under the shipment, to file a claim with either the initial or delivering carrier within four months after the date of delivery of the shipment, and that if the plaintiff failed to file such claim within the time specified, then they should find for the defendant. The court refused both of these instructions. The sole question presented is whether plaintiff was required, as a condition precedent to the institution of its suit, to give notice of and file its claim either with defendant or the delivering carrier within four months after date of delivery of the shipment.

It is argued by the railroad company that because plaintiff failed to show that the damage to the stoves in transit was occasioned by [fol. 140] the negligence of the defendant, then plaintiff could not come within the provisions of the Cummins amendment in respect to the exemption from giving notice of and filing its claim. In other words, that it was necessary for the plaintiff to allege and prove that the damage complained of occurred in transit from the carelessness or negligence of defendant, in order to exempt itself from the requirement of giving notice of and filing claim, under the amendment to the Interstate Commerce Act. If that contention be accorded, the logical result would be that the Cummins amendment would change a well settled rule of law. It would relieve the railway company from rebutting the presumption of negligence attributable to it where a shipper proves that goods have been delivered to it for shipment in good condition and delivered to the consignee in a damaged condition. Unless the shipper had positive and direct proof that the carrier had negligently injured the goods, then he could not take the benefit of the provisions of the Cummins amendment, but would be required to give the notice of and file his claim within four months from the date of delivery. We do not think the Cummins amendment was intended to or does change this well established rule of law: namely, that where goods are delivered to a common carrier in good condition and delivered to the consignee in a damaged condition there is a presumption that the carelessness or negligence of the carrier during the transportation caused the damage. Of course, this presumption is rebuttable. The burden is upon the carrier to show that the damage was caused by act of God, the public enemy, or by some natural infirmity or vice inherent in the goods. B. & O. Ry. Co. v. Morehead, 5 W. Va. 293. This presumption not having been successfully rebutted or attempted to be rebutted, the logical consequence is that the damage to the stoves was occasioned by the negligence of the carrier while in transit. Such being the case, was plaintiff required to file its claim for damages either with the initial or [fol. 141] delivering carrier, within four months after the delivery? Does the Cummins amendment relieve it from that condition precedent to the bringing of its suit? This is the vital question.

The last proviso of that amendment reads:

"Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim or filing of claim shall be required as a condition precedent to recovery."

The railway company cites our decisions in Kahn v. American Ry. Exp. Co., 88 W. Va., 17, —; 106 S. E., 126; and Hubbard Grocery Co. v. Payne, 83 W. Va., —; 118 S. E., 152, which are to the effect that where there is a total or partial loss of goods while in transit then it is the duty of the shipper to give notice and file his claim before he can maintain suit. It is argued that there is no distinction between a total or partial loss of goods while in transit, and damages to goods by the carelessness or negligence of the carrier while in transit. It is also argued that if the loss of the goods in transit requires notice and filing of claim as described in the cases above cited, then by the same reasoning notice of damage and the filing of claim for damages to a shipment resulting from the carelessness and negligence of the carrier while in transit should be given; and if not given within the time then suit could not be maintained. The language of the Cummins amendment is conclusive that where goods are "damaged in transit by carelessness or negligence, then no notice of claim or filing of claim shall be required as a condition precedent to recovery." If it should be held that notice of claim and filing of claim should be given where there is a total loss or partial loss of the shipment while in transit, and also where there is damage to the goods caused by carelessness or negligence of the carrier, then the amendment would be largely emasculated. It would operate only [fol. 142] where the loss, damage or injury was due to delay, or damage while the goods were being loaded or unloaded. Moreover, the bill of lading in the instant case provides: "except where the loss, damage, or injury complained of is due to delay or damage while being loaded and unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier" etc. (There is an omission of the bill of lading in the record; but by reference to the former record, we are able to supply it). This bill of lading is practically the same as the Cummins amendment, and while expressed somewhat differently it contains a clearer statement of what that amendment means. If the shipper is injured by loss or damage due to delay, or damage while the goods are being loaded or unloaded, or if they be damaged in transit by carelessness or negligence, no notice or filing of the claim is required. Thus the Act of Congress reads. It does not say that if the loss of the goods be in transit, then no notice of or filing of claim shall be dispensed with. It is not material or pertinent to inquire what reason or distinction was in the minds of the legislators. The exemption from giving notice and filing claim is expressly confined to two classes of cases, namely, (1) where the loss, damage or injury complained of was due to delay, or damage while being loaded or unloaded; (2) where the damage in transit is occasioned by carelessness or negligence. If the loss be occasioned by negligence in loading or unloading, or

negligence in transit, notice of and filing of the claim is not a condition precedent. So. Ry. Co. v. Prescott, 240 U. S. 632; 60 L. ed. 836. Why should not notice and filing of claim be dispensed with in case the goods are lost or stolen in transit? Reasons are suggested in many of the decisions. See Deaver-Jeter Co. v. So. Ry. Co., 74 S. E. 1071; Georgia T. & A. Ry. Co. v. Blish Milling Co., 241 U. S. [fol. 143] 190; 60 L. ed. 948. It is enough to say that the statute dispenses with notice and filing of claims in one class of cases, and does not do so in the other class. The decisions in the Kahn case, and Hubbard Grocery Co. case do not conflict with our former holding in this case, wherein we held that plaintiff was not barred from maintaining its suit for damages to its stoves in transit caused by the negligence of defendant, because it had filed no notice or claim with the defendant or the delivering carrier within the time prescribed in the bill of lading.

We find no error, and the judgment will be affirmed.

Affirmed.

[fol. 144] In Supreme Court of Appeals of West Virginia

[Title omitted]

Minute Entry—March 24, 1924

A petition for re-argument and rehearing having been filed in the foregoing case this day, said petition is ordered docketed and the final judgment entered in this case on a former day of the present term, to-wit, on the 4th day of March, 1924, is hereby suspended until the further order of this Court.

In Supreme Court of Appeals of West Virginia

[Title omitted]

Order Overruling Petition for Rehearing—July 1, 1924

The Court, having maturely considered the several petitions for re-argument and rehearing heretofore filed in the fourteen foregoing causes, is of opinion to and hereby doth refuse the prayer of said petitions, and doth order that the final judgments or decrees entered in said causes on former days of the present term of this Court be made absolute and be severally certified as heretofore directed.

[fol. 144-1] [File endorsement omitted]

IN SUPREME COURT OF APPEALS OF WEST VIRGINIA

[Title omitted]

PETITION FOR REHEARING—Filed March 24, 1924

[fol. 144-2] To the Honorable the Judges of the Supreme Court of Appeals of West Virginia:

Your Petitioner, The Chesapeake and Ohio Railway Company, a corporation, plaintiff in error in the above styled suit, respectfully represents unto your Honors that on the 4th day of March, 1924, this cause having been before that time submitted, it was decided that the judgment of the Circuit Court of Cabell County in this cause should be affirmed, the opinion being rendered by Judge Lively.

Now, having carefully examined the opinion of this honorable court, your petitioner represents that it is aggrieved by said judgment and opinion, and respectfully submits that with propriety this Court should consider if this case be not one in which it would be proper to grant a re-hearing, upon the grounds hereinafter set out, which have been in part submitted to the court in the Brief heretofore filed by the plaintiff in error in this cause, and now prayed to be taken and read as a part of this petition.

Briefly, the facts in this case are:

The A. F. Thompson Manufacturing Company, plaintiff below, defendant in error, was engaged in the business of manufacturing sheet metal stoves at its plant in the City of Huntington. In the [fol. 144-3] early part of June, 1920, it ordered from the Chesapeake and Ohio Railway Company at Huntington, W. Va., two standard box type freight cars, to be used in shipping a consignment of the stoves manufactured by it. Pursuant to its order, two cars of the kind specified were furnished by the Railway Company, which were admittedly in first class, weather tight condition. Into them the Thompson Company loaded seventeen hundred sheet metal stoves, about twenty per cent of which were packed in pasteboard cartons, sealed with gummed paper, and the remainder wrapped in heavy paper and enclosed in ordinary packing crates.

On June 9, 1920, the Railway Company issued interstate bills of lading, signed by the shipper, for each of the two cars, the doors were sealed and the cars consigned to the Richards and Conover Hardware Company at Kansas City, Missouri.

Upon their arrival at Kansas City, several days later the cars were found, by actual inspection, to be in the same excellent condition as when they left Huntington, with the original seals unbroken. However, when they were opened for unloading by the consignee, seven hundred and seventy-eight of the stoves were so hopelessly rusted as to be unsalable. The other nine hundred and ninety-two were accepted and paid for by the consignee.

[fol. 144-4] The plaintiff, in the Court below, proved as to the seven hundred and seventy-eight damaged stoves,

(a) Delivery to the carrier in good condition,

(b) Delivery by the carrier to the consignee in a rusted condition.

No attempt was made to predicate liability on any other ground, than that the carrier was an insurer of the stoves in question. Upon the presumption created by this proof, the plaintiff below relied for recovery.

The interstate bills of lading under which these two cars moved, contained the following provision:

"Claims for loss, damage or delay, must be made in writing to the carrier at the point of delivery, or at the point of origin within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable."

No attempt was made by the plaintiff below to show a compliance with the above quoted requirements of the bills of lading.

[fol. 144-5] It was the contention of the defendant below, the plaintiff in error in this Court, that upon the record presented, the plaintiff below could not recover.

This Court held in its opinion in this case, that upon the facts presented, no notice of claim or filing of claim was necessary as a condition precedent to suit and liability.

For the reasons fully argued in the Brief of the plaintiff in error heretofore filed herein, and particularly in view of the reasoning of the Courts in the cases of

Georgia, Florida & Alabama R. R. Co. vs. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948;

and

Gillette Safety Razor Co. vs. Davis, D. G. of R. R. (C. C. A.) 278 Fed. 864, 866:
Certiorari Refused 259 U. S. 587,

having carefully examined the opinion of this Honorable Court herein, it is respectfully submitted that said decision, judgment and opinion is contrary to the laws of the United States in such cases made and provided, and particularly to an Act of the Congress of the United States, entitled "An Act to Regulate Commerce," passed by the Congress of the United States on February 4th, 1887, and of subsequent amendatory Acts thereto; that by such decision, judgment and opinion the plaintiff in error herein is deprived of a right reserved to it by the laws of the United States, and particularly by the Act to regulate Commerce above mentioned and its subsequent amendments; that such decision, judgment and opinion is against the right claimed by the plaintiff in error under the laws of the United States, and particularly under the Act to regulate [fol. 144-6] Commerce and its subsequent amendments.

Your petitioner therefore prays that this court will again consider the matters herein involved, that a re-hearing of this cause be had, that upon such re-hearing, the judgment of the lower court may be reversed, and that the mandate in this case be stayed, and as in duty bound, your petitioner will ever pray, etc.

The Chesapeake and Ohio Railway Company, a Corporation, by C. W. Strickling, of Counsel. Fitzpatrick, Brown & Davis, and C. W. Strickling, Counsel for the Chesapeake and Ohio Railway Company.

March 17th, 1924.

[fol. 145] In Supreme Court of Appeals of West Virginia

[Title omitted]

Order Staying Mandate—Aug. 16, 1924

This day came the Chesapeake and Ohio Railway Company, a corporation, the plaintiff in error, and moved the Court that a writ of error and supersedeas be granted herein to the Supreme Court of the United States, which motion the Court overruled, to which action of the Court in overruling its application for such writ of error and supersedeas, the plaintiff in error excepted.

It appearing to the Court that the plaintiff in error desires to file with the Supreme Court of the United States a petition for a writ of certiorari to this Court in this cause, and desires also to have the execution of the judgment herein suspended for a period of ninety days from the 2nd day of July, 1924, the date upon which the last term of this Court adjourned, on motion of the plaintiff in error, it is ordered that the execution of the judgment and mandate herein be stayed for a period of 90 days from the 2nd day of July, 1924, provided, however, that such suspension shall not be and become effective until the plaintiff in error shall give bond before the Clerk of this Court or the Clerk of the Circuit Court of Cabell County, West Virginia, with surety to be approved by the Clerk in the Court in which said bond is filed in the penalty of Twenty-Five Hundred Dollars, conditioned according to law.

[fols. 146 & 147] Bond on Petition for Certiorari for $2,500.00 —Approved and filed Sept. 5, 1924; omitted in printing

[fol. 148] IN SUPREME COURT OF APPEALS OF WEST VIRGINIA

CLERK'S CERTIFICATE

STATE OF WEST VIRGINIA, To wit:

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals, hereby certify that the foregoing is a true and complete copy of the record and filings in the case of A. F. Thompson Manufacturing Company, a corporation, vs. Chesapeake & Ohio Railway Company, a corporation, No. 4996, from the Circuit Court of Cabell County, [fol. 149] lately pending in said Supreme Court of Appeals.

In witness whereof, I have hereto set my hand and the seal of the said Supreme Court of Appeals, at Charleston, this 19th day of September, 1924, and in the 62nd year of the State.

Wm. B. Mathews, Clerk Supreme Court of Appeals. (Seal of Supreme Court of Appeals, West Virginia.)

[fol. 150] SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia

ORDER GRANTING PETITION FOR CERTIORARI—Filed March 2, 1925

On consideration of the petition for a writ of certiorari herein to the Supreme Court of Appeals of the State of West Virginia and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

Office Supreme Court, U. S.
FILED
SEP 25 1924
WM. R. STANSBURY
CLERK

No. 178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924 1925

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a corporation, Petitioner,

vs.

THE A. F. THOMPSON MANUFACTURING COMPANY, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA, AND BRIEF IN SUPPORT OF SAID PETITION.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a corporation, Petitioner,

vs.

THE A. F. THOMPSON MANUFACTURING COMPANY, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA, AND BRIEF IN SUPPORT OF SAID PETITION.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Chesapeake & Ohio Railway Company, respectfully shows unto your Honors that it is aggrieved by a final judgment of the Supreme Court of Appeals of the State of West Virginia in

an action at law therein lately pending, brought by the respondent, A. F. Thompson Manufacturing Company, a corporation, against your petitioner Chesapeake & Ohio Railway Company, a corporation, which final order and judgment was made and entered by the said Supreme Court of Appeals of West Virginia on the 4th day of March, 1924; that on the 24th day of March, 1924, your petitioner filed a petition with said Supreme Court of Appeals of West Virginia, praying for a re-hearing of said cause; that on the 1st day of July, 1924, the Supreme Court of Appeals of West Virginia, in response to the prayer of said petition for re-hearing, made and entered an order denying the prayer of said petition, and directing that the final order and judgment theretofore entered in said cause, to-wit, on the 4th day of March, 1924, be made absolute.

A certified copy of the entire transcript of the record in said cause in which said final order and judgment was made and entered as aforesaid, including the proceedings in said Supreme Court of Appeals of West Virginia, is presented and exhibited herewith, and prayed to be taken and read as a part of this petition.

Your petitioner expressly avers, as from said transcript will appear, that in and by said action at law, so instituted by the respondent, there was especially set up and claimed by your petitioner, by motion to strike the evidence of the plaintiff at the conclusion of the evidence in the trial court and otherwise, a title right, privilege and immunity un-

der a statute and law of the United States and authority exercised under the laws of the United States, and especially under the Act of Congress, (Barnes' Federal Code, Sec. 7976; U. S. Comp. Stat. Sec. 8604-A) known as the Cummins Amendment to the Carmack Amendment to the Interstate Commerce Act, and that the final decision and judgment of said Supreme Court of Appeals of West Virginia was against the title right, privilege or immunity and the authority exercised under the laws of the United States so set up and claimed by your petitioner.

Your petitioner further represents that the final decision and order of the Supreme Court of appeals of West Virginia was a decision and order of the highest court of said State in which a decision could be had, and that the right, privilege and immunity so set up by your petitioner was necessary for a decision of said cause.

STATEMENT.

It will appear from the transcript of the record that the A. F. Thompson Manufacturing Company, respondent, was engaged in the business of manufacturing sheet metal stoves at its plant in the City of Huntington, West Virginia. In the early part of June, 1920, it ordered from the Chesapeake & Ohio Railway Company at Huntington, two standard box type freight cars to be used in shipping a consignment of the stoves manufactured by it. Pursuant to this order, two cars of the kind specified were furnished by your petitioner, which were ad-

mittedly in first class, weather tight condition. Into these cars, the Thompson Company loaded seventeen hundred (1700) sheet metal stoves, about twenty percent of which were packed in paste board cartons, with the seams sealed with gummed paper, and the remainder wrapped in heavy paper, and enclosed in ordinary packing crates.

On June 9th, 1920, the Railway Company issued Interstate bills of lading signed by the shipper for each of the two cars. The doors were sealed, and the cars consigned to the Richards and Conover Hardware Company at Kansas City, in the State of Missouri.

Upon the arrival of these cars at Kansas City, several days later, they were found by actual inspection to be in the same excellent condition as when they left Huntington, with the original seals unbroken. When they were opened by the consignee, seven hundred and seventy-eight (778) of the stoves were so hopelessly rusted as to be unsalable. The other nine hundred and ninety-two (992) were accepted and paid for by the consignee.

The plaintiff, in the court below, proved as to the seven hundred and seventy-eight (778) damaged stoves:

(a) Delivery to the carrier in good condition,

(b) Delivery by the carrier to the consignee in a rusted condition.

No attempt was made to predicate liability on any other ground than that the carrier was an insurer of the stoves in question. Upon the presumption of liability created by this proof, the respondent relied for recovery.

The Interstate bills of lading under which these two cars moved contained the following provision:

> "Claims for loss, damage or delay, must be made in writing to the carrier at the point of delivery, or at the point of origin within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable."

No attempt was made by the respondent to show a compliance with this bill of lading provision.

GENERAL REASONS RELIED UPON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

Your petitioner, in the trial court, and on appeal in the Supreme Court of Appeals of West Virginia, contended, that upon the record presented, the respondent could not recover, because it had not complied with the bill of lading provisions in reference to the filing of claims, hereinbefore adverted to. Both the trial court, and the Supreme Court of Appeals of West Virginia, upon original argument and upon petition for re-hearing, held, that upon the facts presented, no notice of claim or filing of

claim was necessary as a condition precedent to suit and liability.

Your petitioner therefore avers that the said Supreme Court of Appeals of West Virginia erred in its final judgment aforesaid, in which the final judgment of the Circuit Court of Cabell County, West Virginia was sustained, for the following reasons:

(1) That the bill of lading provision limiting the time within which claims must be filed was valid, and that no claim having been filed within the time required, the plaintiff was barred of its right of recovery, if any.

(2) The Court erred in its construction of the Cummins Amendment to the Carmack Amendment of the Interstate Commerce Act (Barnes' Federal Code, Sec. 7976; U. S. Comp. Stat. 8604-A) insofar as it held that the proviso in that Act which provides:

> "Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

excused the respondent from filing claim within the time prescribed by the bills of lading.

Your petitioner further represents that the questions presented by this petition and record have

not yet been passed upon by this court, insofar as your petitioner is advised, and that such questions are of general public interest and importance, particularly to carriers engaged in Interstate Commerce.

WHEREFORE, Your petitioner respectfully prays that a writ of Certiorari be issued out of and under the seal of this court, directed to the Supreme Court of Appeals of West Virginia, commanding said court to certify and send to this court on a day to be therein designated, a full and complete transcript of the record and all proceedings of said Supreme Court of Appeals of West Virginia in said cause, which was entitled in that court "*A. F. Thompson Manufacturing Company, a corporation, plaintiff below, defendant in error v. The Chesapeake and Ohio Railway Company, a corporation, defendant below, plaintiff in error, No. 4996*"; that said cause may be reviewed and all errors in the final judgment and order of the said Supreme Court of Appeals of West Virginia, to the prejudice of your petitioner be corrected by this court, as provided by law, and to the extent necessary for that purpose that said final judgment of the Supreme Court of Appeals, of West Virginia be reversed, set aside and annulled, and that your petitioner may have such other further relief or remedy in the premises to which it may be entitled, and as in duty bound, your petitioner will ever pray, etc.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a corporation,

By C. N. Davis

C. W. Strickling

Of Counsel.

C. N. Davis

C. W. Strickling

Attorneys for Petitioner.

STATE OF WEST VIRGINIA,
COUNTY OF CABELL, ss:

CARY N. DAVIS, being duly sworn, deposes and says, that he is counsel for the Chesapeake & Ohio Railway Company, a corporation, the above named petitioner; that he has read the foregoing petition, and is authorized to make this affidavit, and that the facts therein alleged are true, as he verily believes.

C. N. Davis

Taken, sworn to and subscribed before me, the undersigned Notary Public, this 20th day of September, 1924.

My commission expires November 17th, 1930.

J. W. Hagen, Jr.

Notary Public.

I hereby certify that I have examined the foregoing petition, and in my opinion, the petition is well founded, and that this cause is one in which the prayer thereof should be granted by the Supreme Court of the United States.

C. N. Davis

Of Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a corporation, Petitioner,

vs.

A. F. THOMPSON MANUFACTURING COMPANY, a corporation, Respondent.

BRIEF ON BEHALF OF THE CHESAPEAKE & OHIO RAILWAY COMPANY IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI.

The writ of *certiorari* petitioned for in the foregoing petition, for the reasons therein stated, is based upon the failure of the Supreme Court of Appeals of the State of West Virginia to give effect to the bill of lading provision mentioned in said petition, which defines the time within which claims for loss or damage may be filed.

Notwithstanding the fact that similar provisions have been held reasonable by this and other courts, the Supreme Court of Appeals of West Virginia, by its judgment and opinion, held, that by virtue of the last proviso of the Cummins Amendment to the Carmack Amendment to the Interstate Commerce Act (Barnes' Federal Code, Sec. 7976; U. S. Comp. Stat. Sec 8604-a) no claim was required to be filed in this case as a condition precedent to suit and recovery.

A. F. Thompson Mfg. Co. v. C. & O. Ry. Co.
(W. Va.) 123 S. E. 421.

POINTS AND AUTHORITIES RELIED UPON

1: The provisions in the interstate bills of lading under which the two cars here in question moved, which limit the time for filing of claim to four months as a condition precedent to liability, are reasonable.

No citation of authority is necessary to support this proposition. It does not contravene any of the provisions of the Acts of Congress, and similar provisions have been repeatedly held reasonable by this court.

Georgia, Florida & Alabama R. R. Co. v. Blish Milling Co. 241 U. S., 190; 36 Sup. Ct. 541; 60 L. Ed. 948.

2: The damage to the shipments involved herein did not occur while the shipments were being loaded or unloaded. If, therefore, the respondent desires to put himself within the last proviso of the Cummins Amendment above referred to, it must be shown that such damage resulted from the *negligence* of carrier.

The record will indicate that there was no evidence of *negligence* on the part of the carrier. The respondent was furnished with first-class weather-tight cars. They were sealed at Huntington, West Virginia, and went forward to Kansas City, Missouri, within a normal length of time, and upon arrival were shown by actual inspection to be in weather-tight condition, with no evidence of leakage or other equipment defects, and with the original seals unbroken. The respondent proved that the stoves were delivered to the carrier in good condition, and that a part of them were delivered to the consignee badly rusted. Upon the presumption arising from this proof, without proof of a compliance with the bill of lading provisions relating to the filing of claim, the respondent relied for recovery.

The pertinent parts of the Cummins Amendment are:

> "If the loss, damage or injury complained of was due to . . . . damage in transit by carelessness or negligence . . . ."

In order, therefore, to support a recovery, in

the absence of proof of the filing of claim, it was necessary for the respondent to have shown that the damage complained of resulted from the *carelessness or negligence* of this petitioner. This it failed to do. The Supreme Court of West Virginia, by its judgment and opinion, held, that proof of delivery in good condition to the carrier, and delivery in less than good condition by the carrier, to the consignee, raised a presumption of negligence and put the case within the provisions of the above-mentioned proviso.

It is submitted that this presumption is not, properly speaking, a presumption of negligence, but rather a presumption of liability arising from the fact that when goods are delivered to a carrier for transportation, that carrier immediately becomes an insurer. If the goods are lost or damaged in transit, the carrier can only escape liability by showing that the loss or damage was the result of one of the causes commonly known as the excepted risks. It is true, of course, that many of the courts have loosely said, as did the Supreme Court of West Virginia in this case, that the presumption thus created is a presumption of negligence; but whether that statement is or is not accurate, (and we think it is not), such a presumption will not put a shipper within the proviso of the Cummins Amendment and excuse him from filing claim when he sustains a loss, either by a loss of all or part of his goods in transit, or by their damage, unless that damage resulted from some active negligence on the part of the carrier.

Georgia, Florida & Alabama R. R. Co. v. Blish Milling Company, 241 U. S., 190; 36 Sup. Ct., 541; 60 Law Ed. 948.

Gillette Safety Razor Co. v. Davis (C. C. A.) 278 Fed., 864, 866.

Certiorari Refused, 259 U. S. 587.

Cunningham v. Missouri Pacific R. R. Co. (Mo.) 219 S. W. 1003.

Hubbard Grocery Co. v. Payne (W. Va.) 118 S. E., 153.

Kahn v. American Ry. Express Co. 88 W. Va., 17; 106 S. E., 126.

Hailey v. Oregon Short Line R. R. Co., 253 Fed. 569, 572.

The Supreme Court of West Virginia, in the case of *Kahn v. American Railway Express Company, supra*, following the doctrine laid down by this Court in the *Georgia, Florida & Alabama Railroad Company v. Blish Milling Company case, supra*, held, that where a loss occurred of part of the shipment in transit, that the filing of claim within the time provided for in the bill of lading was necessary as a condition precedent to recovery. In both of these cases, the only evidence was, that the goods were delivered to the carrier in good condition, and that a less amount than that delivered to the carrier was delivered by the carrier to the consignee. In case of loss, as in case of damage, the carrier is subject to the presumption of liability. It is, we think, inconceivable, that in the case of loss the presumption created against the carrier can be said not to be a presumption of negligence, and thus require the shipper to file a claim, and that in the case of damage the

presumption created from similar proof can be said to be negligence and excuse the shipper from filing claim. If the reasoning followed by the Supreme Court of Appeals of West Virginia in the case at bar were followed to its logical conclusion, all cases in which either loss or damage occurred would be cases in which the shippers or consignees would not be required to file claims, and the carriers would thus be deprived of the right to have notice in time to make prompt investigation, a right which is an integral part of all shipping contracts, recognized in the Act of Congress itself, which provides that no shorter period than four months shall be fixed by a carrier for filing claim.

For these reasons, therefore, it is respectfully submitted, that the writ of *certiorari* prayed for in the annexed petition should be allowed, and the errors of law committed by the Supreme Court of Appeals of West Virginia corrected by this Court.

C. N. Davis

C. W. Strickling

Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a corporation, Petitioner,

vs.

A. F. THOMPSON MANUFACTURING COMPANY, a corporation, Respondent.

TO A. F. THOMPSON MANUFACTURING COMPANY, A CORPORATION, AND HENRY SIMMS, ESQUIRE, ITS ATTORNEY:

You will please take notice that upon a certified copy of the transcript of the record in this cause, and upon the annexed petition and brief of The Chesapeake & Ohio Railway Company, a corporation, we shall move the Supreme Court of the United States, at the Capitol, in the City of Washington, District of Columbia, on the sixth day of October, 1924, at the opening of said Court on that day, or as soon thereafter as counsel can be heard, for the allowance of a writ of *certiorari* to the Supreme Court of Appeals of West Virginia in the above-styled case, and for such other and further relief as the foregoing petitioner may be entitled to, or as the nature of the case may require.

Dated Huntington, West Virginia, this 20th day of September, 1924.

C. N. Davis

C. W. Stickling

Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a corporation, Petitioner,

vs.

A. F. THOMPSON MANUFACTURING COMPANY, a corporation, Respondent.

Now comes the petitioner, by Cary N. Davis, its attorney, and moves this Court, upon a certified copy of a transcript of the record herein, and upon the annexed petition, sworn to on the 20th day of September, 1924, for a writ of certiorari, directed to the Supreme Court of Appeals of West Virginia, to bring before this Honorable Court, for review, the proceedings herein in said Supreme Court of Appeals of West Virginia, and for such other and further relief in the premises to which this petitioner may be entitled and the nature of the case require.

C. N. Davis

Counsel for Petitioner.

Office Supreme Court, U. S.
FILED
DEC 19 1925
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 178.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation, PETITIONER,

vs.

THE A. F. THOMPSON MANUFACTURING COMPANY, a corporation, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

BRIEF OF
C. N. DAVIS AND C. W. STRICKLING
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 178.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation, PETITIONER,

vs.

THE A. F. THOMPSON MANUFACTURING COMPANY, a corporation, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

1.

OPINION IN STATE COURT.

The opinion delivered by the Supreme Court of Appeals of West Virginia in this case, is reported in 95 W. Va. 670, 123 S. E. 421.

2.

JURISDICTION.

The jurisdiction of this court is invoked under the provisions of Section 237 of the Judicial Code, as amended by the Act of September 6th, 1916, c. 448, § 2, (39 Stat. 726, Comp. Stat. § 1214), under which this court may require by certiorari, or otherwise, that there be certified to it for review, any cause wherein a final judgment has been rendered by the highest court of a State in which a decision could be had, and where any title, right, privilege, or immunity is claimed under the constitution or statutes of the United States. The right claimed by the petitioner in the West Virginia State Courts was the right to require that claim, in writing, be filed with it or its connections within four months after the delivery of the shipment involved in this case, as a condition precedent to suit and judgment, as required by the provisions of the interstate bills of lading under which said shipment moved. The State Courts of West Virginia held, that under the provision of the Act of Congress of March 4th, 1915, known as the First Cummins Amendment (38 Stat. 1196, 1197, c. 176), amending Section 20 of the Act to Regulate Commerce, of February 4th, 1887, c. 104, 24 Stat. 386, as amended by Section 7 of the Act of June 29th, 1906, c. 3591, 34 Stat. 593, 595 (Comp. St. §8604a), it was not necessary, as a condition precedent to suit and judgment, that such claim be filed.

The claim that it was necessary that such claim be filed as a condition precedent to recovery was

advanced by the petitioner when the case was tried in the Circuit Court of Cabell County, West Virginia, by motion made at the conclusion of all the evidence, in accordance with the West Virginia practice, to strike out the evidence of the respondent and to direct a verdict for the petitioner, because the record did not show that claim had been filed within four months, or any other time, as required by the bills of lading. This motion was overruled, and a proper exception made (R. 83, 84). The same question was likewise raised in the same court by an instruction offered by the petitioner, and refused by the court (R. 87), as well as by motion made to set aside the verdict and award petitioner a new trial, as shown by the final judgment of the above mentioned Circuit Court (R. 89). The same questions were raised in the Supreme Court of Appeals of West Virginia, by petition for writ of error (R. 2, 3), which contained the specific assignment of error that the lower court erred in holding that there was no necessity of filing claim in writing. The Supreme Court of West Virginia held, by its judgment of March 4th, 1924 (R. 92), and by its refusal to grant a re-hearing, by an order made July 1st, 1924 (R. 96), that claim in writing was not required to be filed as a condition precedent to recovery, notwithstanding the specific provisions of the shipping contracts, as contained in the bills of lading.

The following cases decided by this court sustain the jurisdiction of this court to hear and determine the questions presented by this record:

American Railway Express Co. vs. Lindenburg, 260 U. S. 584,.....L. Ed.....
43 Sup. Ct. Rep. 206.

Barrett vs. Van Pelt, 268 U. S. 85, 69 L. Ed. 465, 45 Sup. Ct. Rep. 437.

3.

STATEMENT OF FACTS.

It will appear from the record that The A. F. Thompson Manufacturing Company, respondent, was engaged in the business of manufacturing and selling sheet metal stoves at its plant at Huntington, West Virginia. In the early part of June, 1920, it ordered from petitioner, The Chesapeake and Ohio Railway Company, at Huntington, two standard box type freight cars, to be used in shipping a consignment of the stoves manufactured by it. Pursuant to this order, two cars of the kind specified were furnished by the petitioner, which were admittedly in first-class weather tight condition (R. 43, 69). Into these cars the respondent loaded seventeen hundred sheet metal stoves, above twenty per cent of which were packed in pasteboard cartons, with the seams sealed with gummed paper. The remainder were wrapped in heavy paper, and packed in ordinary open packing crates.

On June 9th, 1920, the carrier issued interstate bills of lading, signed by the shipper, for each of the two cars. (R. 15 to 23.) The doors were sealed, and the cars consigned to the Richards and Conover Hardware Company, at Kansas City, in the State of Missouri.

Upon the arrival of these cars at Kansas City several days later, they were found, by actual in-

spection, to be in the same excellent weather-tight condition as when they left Huntington, (R. 73 to 76, 81, 82), with the original seals unbroken, (R. 59), and no evidence of any leakage or other defects which might be calculated to damage their contents. When they were opened by the consignee, seven hundred and seventy-eight of the stoves were so hopelessly rusted that they were unsalable; the others were accepted and paid for by the consignee.

The respondent in the trial court proved, as to the seven hundred and seventy-eight damaged stoves:

(a) Delivery to the carrier in good condition;

(b) Delivery by the carrier to the consignee in a rusted condition.

No attempt was made to show that there was any negligence on the part of the carrier in loading, receiving, transporting or unloading the shipment, or to predicate liability on any other ground than that the carrier was an insurer of the stoves in question. Upon the presumption of liability created by this proof the respondent relied for recovery.

4.

SPECIFICATION OF ASSIGNED ERRORS.

Your petitioner relies upon the following assigned errors, specifically set up in its petition filed in this court:

(1) That the State Courts of West Virginia, including the highest court of that State in which a final judgment could be had, erred in holding that, under the Act of Congress of March 4th, 1915, known as the First Cummins Amendment, the respondent was relieved of the necessity of filing claim within the time required by the interstate bills of lading, as a condition precedent to suit and recovery.

ARGUMENT.

At the time of the delivery of the stoves involved in this case to the petitioner for transportation, the petitioner issued bills of lading covering the two cars shipped, which were signed by the shipper. The third paragraph of Section 3 of the conditions of each of these bills of lading contained the following provisions:

> "Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin, within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable. (R. 17, 18, 21, 22)"

By the very terms of the bills of lading, the shipment was made subject to all conditions therein contained, and the tariffs and classifications in effect at that time.

The provisions of the shipping contracts relating to the time of filing claims are valid. They do not contravene any of the provisions of the Acts of Congress, and similar provisions have been repeatedly held reasonable and valid by this court. *Georgia, Florida and Alabama R. R. Co. vs. Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948, 36 Sup. Ct. Rep. 541.

The respondent made no attempt to show a compliance with the above quoted bill of lading provisions, but relied upon the last proviso contained in Chapter 176 of the Act of Congress of March 4th, 1915, known as the First Cummins Amendment, above adverted to. The last two provisos of this Chapter are:

> "Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise, a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

It should be noted at the outset that the shipping contracts above referred to were made on old forms of bills of lading, in use prior to the enactment of the First Cummins Amendment, and do not, as do the bills of lading now in use, contain the final pro-

Careless

viso of that Amendment. We must concede, however, that the provisions in the contracts relating to the filing of claim, are qualified by the final proviso of the First Cummins Amendment.

Were it not for this final proviso there would be no question as to the validity of the defense interposed in the court below by the petitioner. *Georgia, Florida and Alabama R. R. Co. vs. Blish Milling Co., supra.*

It follows then, that the sole question here involved is whether under the proof adduced by the respondent it was excused, by virtue of the final proviso of the First Cummins Amendment, from its duty to affirmatively show a compliance with the above quoted bill of lading provisions.

It is submitted that this record does not present such a case. It is undisputed that whatever happened to the stoves involved in this shipment, happened between the time they left Huntington and the time they arrived at Kansas City. The case is therefore a case of damage in transit.

Under the second proviso of the above mentioned Act of Congress, filing of claim is dispensed with in such circumstances only when damage results from carelessness or negligence. *Barrett vs. Van Pelt*, 268 U. S. 85, 69 L. Ed. 465, 45 Sup. Ct. Rep. 437. *Davis, Director General vs. John L. Roper Lumber Co.*, (U. S. Nov. 16, 1925), 46 Sup. Ct. Rep. 28.

No claim having been filed, it is essential that the record show that the shipment here involved was

damaged in transit by carelessness or negligence. To determine whether such a showing was made, it is necessary to analyze the situation as presented by the record.

The respondent proved that the stoves were delivered to the carrier in good condition, and that a part of them were delivered by the carrier to the consignee, badly rusted. Upon the *prima facie* presumption arising from this proof the respondent relied for recovery. The carrier proved that the respondent was furnished with first-class weather tight cars (R. 43, 69); that the cars were sealed at Huntington, West Virginia, and went forward to Kansas City, Missouri, within a normal length of time where, upon their arrival, they were shown, by actual inspection, to be in weather tight condition, with no evidence of leakage or other equipment defects (R. 73 to 76, 81, 82), and with the original seals unbroken (R. 59).

Under this proof the carrier can not be said to have been guilty of carelessness or negligence, which resulted in the damage to the shipment in transit.

It is true, when a shipper shows delivery of goods to a carrier in good condition, and non-delivery or delivery to the consignee in damaged condition, that there arises a *prima facie* presumption of liability. It is likewise true, that many of the courts have said that this presumption is a presumption of negligence. But it was certainly not the intention of Congress to exempt shippers from their duty to give to carriers reasonable notice of claims where such claims were based on a mere

prima facie presumption. Whether this presumption be called a presumption of negligence or one of liability is, in our view of it, immaterial, as it is based entirely upon the peculiar relation that exists between shippers and carriers, which makes a carrier an insurer of goods entrusted to it for transportation, and, in case of loss, injury or damage to such goods, imposes upon it the burden of showing that such loss resulted from one of the so-called excepted risks. In such cases liability is not imposed upon carriers because of negligence, but is imposed upon them because, as insurers, they must either deliver goods entrusted to them in the same condition as when they were received, or show affirmatively that their failure to make such delivery was the result of one of the causes coming under the excepted risk classification. It often happens that carriers are held liable under their strict liability as insurers, where loss or damage results from some cause beyond their control, and not from negilgence, where such loss can not be brought under one of the common law exceptions.

When Congress saw fit to exempt certain classes of claims from the requirement that reasonable notice be given, it can be fairly presumed that such exceptions had some basis in reason. It has heretofore been the policy of the courts and of the law makers to require that reasonable notice of claims be given, where the carrier had no opportunity of observing or ascertaining that something had happened for which a claim might be made, so that a prompt and thorough investigation might be made to determine the question of liability. Such a policy is in accord with sound reason and fairness. On

the contrary if, during the transportation of a shipment, something happened which might reasonably be calculated to put the carrier on notice that a shipment had been damaged, and that therefore a claim might be expected, such notice might not be necessary, as the carrier would already have notice of the fact that a claim might reasonably be expected.

As this Court said, in *Barrett vs. Van Pelt, supra*:

> "There are such differences between liability without fault and that resulting from negligence that Congress upon good reasons might permit carriers to require notice and filing of claim within the specified times where the carrier is without fault, and forbid such a requirement in the cases referred to where the loss results from the carrier's negligence. Notice and filing of claim warns the carrier that there may be need to make investigations which otherwise might not appear to be necessary; and if notice of claim is given and filing of claim is made within a reasonable time it serves to enable the carrier to take timely action to discover and preserve the evidence on which depends a determination of the merits of the demand. As to claims for damages not due to negligence in the absence of notice, there may be no reason for anticipating demand or to investigate to determine the fact or extent of liability. But as to damages resulting from carelessness or negligence, it reasonably may be thought the the c a r r i e r has such knowledge of the facts or has such reason to expert claim for compensation to be made against it that the

carrier should not be permitted to exact such notice and filing of claim as a condition precedent to recovery. No other basis of classification seems as well supported in reason as the element of carelessness or negligence."

The instant case is strongly illustrative of the unfair result which would be reached if the rule announced by the Supreme Court of West Virginia were sustained. In this case the carrier had no notice of anything that might lead it to believe that any claim might be expected. If suit had not been promptly instituted, and if the respondent had taken advantage of its privilege of waiting two years before instituting suit, it, the carrier, would have had no opportunity to make prompt and thorough investigation and preserve the evidence upon which the question of liability might be determined.

This court held, in *Barrett vs. Van Pelt, supra*, that the phrase in the First Cummins Amendment, "by carelessness or negligence," should be construed as being included in the definition of all classes of claims, and construed the final proviso of that amendment to read as follows:

> "Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a dition precedent to recovery."

Under this construction, the phrase "by carelessness or negligence" applies to all classes of

claims,—loss, damage or injury. The rule of proof, above discussed, which gives rise to a presumption against the carrier upon a showing of delivery in good condition and total or partial non-delivery by the carrier to the consignee, or delivery by the carrier to a consignee in a damaged condition would, if the holding of the Supreme Court of Appeals of West Virginia in the present case were followed, entirely relieve all shippers from filing claims where there was either a loss, damage or injury, because the presumption arising from the rule of proof above discussed, is exactly the same, whether the claim be one of loss, or damage or injury. In other words, if in the instant case, a part of the stoves had been lost instead of damaged, and the proof of the respondent showed that fact, there would be imposed upon the carrier a *prima facie* presumption of liability. Could it be said that Congress intended by the final proviso of the First Cummins Amendment, to exempt a shipper from filing claim in such a case? We think not. If this be true, the conclusion is irresistible that it was likewise not the intention to exempt a shipper from filing claim where there was a damage in transit and no proof of negligence or carelessness other than the *prima facie* presumption arising from the showing hereinbefore mentioned made by the respondent.

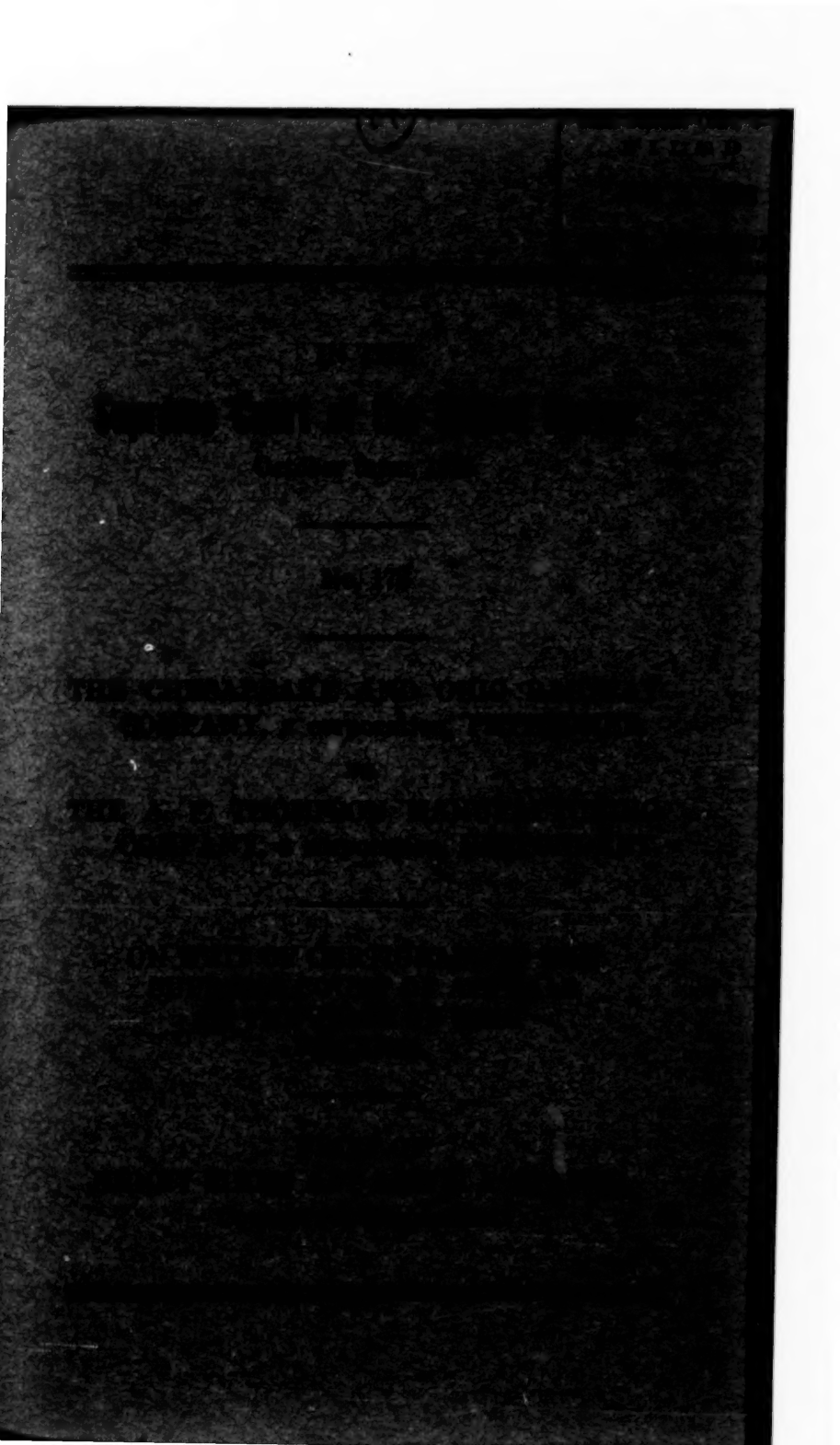
See *Hailey vs. Oregon Short Line R. Co.*, 253 F. 569, 572; *Gillett Safety Razor Co. vs. Davis* (C. C. A.) 278 F. 864; *Cunningham vs. Missouri Pacific R. Co.*, (Mo. App.), 291 S. W. 1003.

Under all these circumstances, we believe that this record does not present a case which brings the

respondent within the final proviso of the First Cummins Amendment, and which excused it from a compliance with the valid bill of lading provisions requiring that seasonable notice be given to the carrier of the claim here asserted by filing such notice in writing within four months after the delivery of the shipment in question.

It is respectfully submitted that the final judgment of the Supreme Court of West Virginia in this case should be reversed.

C. N. DAVIS,
C. W. STRICKLING,
Counsel for Petitioner.



INDEX

SUBJECT

CASES CITED

IN THE

Supreme Court of the United States

October term, 1925

No. 178

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation, PETITIONER.

vs.

THE A. F. THOMPSON MANUFACTURING COMPANY, a corporation, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

I.

STATEMENT OF FACTS

The statement of facts made by Counsel for petitioner in their brief filed herein on pages four and five thereof is fair and needs no addition or modification.

II.

ARGUMENT

It is conceded by the Counsel for Petitioner that the provisions in the contracts commonly called bills of lading relating to the filing of claims are qualified by the final proviso of the First Cummins Amendment. It is further conceded by Counsel for Petitioner in their brief that what ever happened to the stoves involved in this shipment happened between the time they were delivered to The Chesapeake & Ohio Railway Company at Huntington, West Virginia, and the time they arrived in Kansas City, Missouri, the point of final destination.

The common carriers are not made insurers of freight entrusted to their care as is very often loosely stated. They are, however, conclusively presumed as a matter of law to be guilty of carelessness or negligence in the handling of shipments of freight in their possession unless the carrier is able to prove that the loss, damage or injury to the goods was caused by one of the exceptions which are, Acts of God, Acts of Public Enemy or causes due to the inherent or intrinsic nature of the shipments. The reason for the rule is based upon the experience of centuries and from the fact that it is well known and conceded by practically all Courts that if a plaintiff were compelled to establish in a suit for damages to goods in transit that the damage was caused by negligence or carelessness of the common carrier to whom the goods had been entrusted it would be practically im-

possible in most cases to ever establish the cause, because the goods are entirely in the care and custody of the common carrier and the shipper has no means to trace the shipment, or to discover how the loss occurred. This is hardly a proper subject of controversy in this case because it seems to be about the most universally admitted and established rule of law known to the Courts, not only of the United States but also of England, where, of course, the rule originated.

We could cite many decisions of every Court in the Union in support of this propositon, but deem it unnecessary and shall only cite from decisions of the United States Supreme Court bearing upon this point and of some of the States of the Union which seem to be decisive on this question.

In the case of Hall vs. Nashville and Chattanooga Railway Company, 13 Wall, U. S. 367, 20th L. E. D., 594, a case where this question was at issue, Mr. Justice Strong in delivering the opinion spoke as follows:

> "A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to a cession of the remains of the property, or to have the loss adjusted on principles peculiar to the contract of insurance, and when a loss occurs, unless

> caused by the Acts of God, or a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent, he has in fact consented by his contract to be dealt with as if it were not so. He does not stand, therefore, on the same footing as an insurer, who may have entered into his contract of indemnity, relying upon the carriers' vigilance and responsibility. In all cases, when liable at all, it is because he is proved, or presumed to be, the author of its loss."

We also cite The Majestic, 166, U. S. 375, 17 S. C. T. 597, 41 L. ed. 1039; The Caledonia, 157, U. S. 124, 15 S. C. T. 537, 39 L. ed. 644; The Edwin I. Morrison, 153, U. S. 199, 14 SCT 823, 38 L. ed. 688; Memphis, etc., R. Co. vs. Reeves, 10 Wall. 176, 19 L. ed 909; Clark vs. Barnwell, 12 How. 272, 13 L. ed. 985.

Corpus Juris, Volume 10, Carriers, Section 576:

> "Where a loss of, or injury to, goods while in the carrier's possession is shown, a prima facie case is made out against it, and the burden of proof then devolves on it to show that the loss or injury was due to one of the causes excepted at common law, such as an act of God or an act of the enemy, an act or fault of the shipper, the inherent nature of, or defects in, the property shipped, or a seizure thereof under legal process, if it re-

> lies on such common-law exceptions as a defense; and it has been held that the Carmack amendment which invalidates the provisions of any state law nullifying contracts limiting a carrier's liability for loss or damage to the agreed value, and which makes no provision as to evidence, does not invalidate a state law expressly placing the burden of proof on the carrier to show that loss or injury occurred by reason of an excepted cause."

National Rice Mill Company vs. New Orleans, etc., R. Company, 132 La. 615, 61 S. 708.

> It has further been held that, "the rule that proof of delivery to a railroad company of an interstate consignment in good condition and of its receipt in bad condition is a sufficient prima facie showing to establish carrier's liability is not affected by the Carmack amendment." Corpus Juris, Volume 10, Carriers, Section 572.

Collins vs. Denver, etc., R. Company, 181 Mo. A. 213, 167, SW 1178.

Counsel for the Petitioner advance the novel argument that the presumption of neglect on the part of the shipper in this case is not a presumption of neglect but a presumption of liability. We believe that the statement of Mr. Justice Strong of the Supreme Court of the United States made in the case of Hall vs. Nashville and Chattanooga Railway Company, hereinbefore quoted, is a complete refutation of their claim in that respect.

Mr. Justice Strong states the law is that where goods are delivered to the carrier in good condition and are delivered by the carrier in bad condition at the point of destination it raises a conclusive presumption of misconduct and breach of duty on the part of the carrier and this can only mean that it raises a conclusive presumption of negligence and carelessness on the part of the carrier. It should be noted that Mr. Justice Strong holds that the presumption in such case is conclusive and not disputable. Of course, if the carrier attempts to exculpate itself it can only do so by introducing evidence, which may tend to show that the damage was caused by one of the excepted causes hereinbefore referred to. If the carrier does not attempt to exonerate itself in such manner the conclusive presumption of neglect attaches with full force and vigor. A presumption of law is as binding, and probably more binding, upon a Court than any kind of evidence that can be introduced.

See Jones on Evidence, Second Edition, Section 11.

> "When an inference derives from the law some arbitrary or artificial effect and is obligatory upon judges and juries, that inference is a presumption of law. It arises when the facts found are in point of law inconsistent with any supposition except that of the existence or non-existence of the fact in controversy, in which case the conclusion is necessary, independently of any belief based upon what is

> more or less probable, because the law declares the uniform effect of such a state and condition of circumstances. Presumptions of law are generally divided into two classes, conclusive and disputable."

Citing Sun Mutual Insurance Company, vs. Ocean Insurance Company, 107, U. S. 485, also, First Greenleaf Evidence, Section 44.

> "Conclusive or absolute presumptions of law are rules determining the quantity of evidence requisite for the support of any averment which is not permitted to be overcome by any proof that the fact is otherwise."

See Jones on Evidence, Second Edition, Section 15:

> "This rule does not apply in the case of common carriers, who, on grounds of public policy, are presumed to have been negligent if goods entrusted to their care have been lost or damaged."

Citing The Nitro Glycerine Case, 15 Wall, 524; Philadelphia Railway Company, vs. Anderson, 72 Md. 519.

We believe that the above citations show beyond cavil, that there is a conclusive presumption of negligence in the case at bar that the damage to the goods was caused by negligence and carelessness of The Chesapeake and Ohio Railway Company.

This case was tried to a jury under common law procedure and it is conceded by Counsel for Petitioner that the Respondent proved that the goods were delivered to the Petitioner in good condition and were delivered by the Petitioner in bad condition, and under the law as laid down by Mr. Justice Strong, above referred to, the law raises a conclusive presumption of negligence and the jury in finding their verdict in favor of Respondent in the Circuit Court of Cabell County, West Virginia, passed upon the question of negligence on the part of The Chesapeake and Ohio Railway Company and decided that the railroad company was guilty of negligence in this case in legal effect exactly the same as if there had been positive and affirmative proof of the exact cause of the damage to the stoves while in transit. The legal effect of failure of The Chesapeake & Ohio Railway Company to introduce any evidence in its behalf to show how the injury to the stoves occurred while in its custody amounted to a concession before the jury that the railroad company was guilty of negligence. It is the law that if a fact is conceded by a party to the suit, or by its Counsel, during the trial of a cause, it is absolutely binding upon such party. In other words, The Chesapeake & Ohio Railway Company was confronted with an absolute presumption of neglect on its part after the plaintiff had introducted its evidence in the Circuit Court of Cabell County, West Virginia, and its Counsel, of course, were fully aware of such presumption of neglect and

by the failure to introduce any evidence in an attempt to bring the cause of damage within the excepted causes, such as Act of God, etc., they in legal effect conceded that the plaintiff had established a case of negligence against the defendants in the Circuit Court.

We believe that we have successfully refuted the claim of Counsel for Petitioner that liability is not imposed upon carriers because of negligence but is imposed upon them as insurers (See pp. 9 and 10 of Brief Counsel for Petitioners.) Certainly no one should assume that Congress in enacting the First Cummins Amendment intended to destroy the common law presumption of negligence in cases similar to the case at bar; nor should anyone assume or argue that it was the intent of Congress to change the rules of evidence as they existed in such cases at the time of the enactment of the First Cummins Amendment. Certainly Congress must be presumed to have known and to have been fully conversant with the legal obligations of common carriers in such cases and did not intend to modify or interfere with the existing legal obligations of the carriers or with the rules of evidence relating to the same as uniformly held by the Courts prior thereto.

Counsel for Petitioner argue on page 10, their brief, as follows:

> "It has heretofore been the policy of the courts and of the law makers to require that reasonable notice of claims be given, where the carrier had no oppor-

> tunity of observing or ascertaining that something had happened for which a claim might be made, so that a prompt and thorough investigation might be made to determine the question of liability."

By the enactment of the First Cummins Amendment Congress surely settled that point and made it the law that in all cases where the loss, or damage was caused by negligence or carelessness on the part of the common carrier in transit cases that no notice of claim is necessary to be given to the common carrier making the First Cummins Amendment apply to the law as it was at the time of the enactment of the amendment relating to the liability of carriers. In other words, "carelessness and negligence" as used in the First Cummins Amendment include all classes of carelessness and negligence, both carelessness and negligence which must be affirmatively proved as in the case of Barrett vs Van Pelt, 268 U. S. 85, cited by Counsel for Petitioner, and negligence and carelessness which is conclusive and absolutely presumed as in the case at bar. It is the contention of Respondent that a conclusive presumption of carelessness and negligence, as exists in the case at bar is within the meaning of the words, "carelessness and negligence" as used in the First Cummins Amendment.

The case of Barrett vs. Van Pelt, referred to above, and cited by Counsel for Petitioner has no application to the case at bar because the facts

are not similar to the facts in the case at bar. In the Barrett vs. Van Pelt case the claim was for damage due to delay in shipping the goods and not to any actual damage to the goods themselves whatever. The plaintiff claimed that he had shipped some eggs over the Adams Express Company to the New York market and that they should have arrived in thirty hours from the time they were delivered but they were not delivered until several days thereafter and that in the interim the price of eggs had declined in the New York market, and he lost money by reason thereof. There was no damage alleged to the eggs themselves. Of course, there is no presumption of negligence on the part of the carrier in case of delayed shipments as there is in the case at bar. It has also been held in cases where a shipper claims that a common carrier has been guilty of negligence in delaying a shipment of goods that it was incumbent upon the shipper to establish by affirmative evidence that the delay was caused by the negligence of the common carrier, and that the proximate cause of damage to the goods was the negligent delay. In establishing these facts the burden is on the shipper always to show what is the reasonable or usual time for the shipment of goods to arrive in the particular case and that the damage would not have occurred had the goods been delivered in the usual time. This is certainly an entirely dissimilar state of facts from the facts established in the case at bar, and the rules of law applicable thereto are also entirely different.

See Corpus Juris, Volume 10, Carriers, Section 404.

> "A carrier is not an insurer against delay in the transportation of goods. The principle on which the carrier's extraordinary liability is founded does not extend to the time occupied in transporting the goods. As to the time of delivery, their liability stands on the same ground as that of ordinary bailees for hire. (Citing, Southern Pacific Railway Company, vs. Arnett, 126, Fed. 75, 61 CCA 131; Farmers' L. & T. Co. vs. Northern Pacific Railway Company, 120 Fed. 873, 57 CCA 533; Delaney vs. U. S. Express Company, 70 W. Va. 502)."

It is plain, therefore, that there is no presumption of negligence on the part of the common carrier in the case of Barrett vs. Van Pelt, and that case cannot be used to uphold the contention of Counsel for Petitioner in this case; likewise the case of Davis, Director General vs. Roper Lumber Company, U. S. 46 Sup. Ct. 28. It has no bearing upon the case at bar because in the Roper case the property had actually been delivered to the wrong person and not to the legal owner, and the loss was due solely to mis-delivery and this Court properly held that such a state of facts did not bring the case within the second proviso of the First Cummins Amendment.

The other cases cited by Counsel for Petitioner are not applicable to the case at bar. The plaintiff in the Circuit Court of Cabell County, West

Virginia by legal and competent evidence established that The Chesapeake & Ohio Railway Company was guilty of negligence and carelessness in the handling of the shipment of stoves in transit; that the absolute presumption of law which is raised in this case is as much proof of carelessness and negligence as if established by oral or documentary evidence showing the exact cause of damage. We further believe that the jury which rendered the verdict against the railroad company, after having heard all evidence in the case, has settled all questions as to carelessness and negligence adversely to the said railroad company, and that the verdict of the jury must stand. Even if the defendant had introduced evidence in an attempt to exonerate itself from liability under any of the excepted causes, the question would still have been one to be settled by the jury and if the jury had rendered a verdict in favor of the plaintiff the Appellate Court would not have interfered with the verdict, unless it was plainly contrary to the weight of evidence or to the preponderence of evidence. Not having introduced any evidence to contradict the absolute and conclusive presumption of negligence and carelessness on the part of the railroad company, the jury had the absolute right to render a verdict in favor of plaintiff, which verdict cannot be reversed in an Appellate Court.

We further believe that Congress in enacting the First Cummins Amendment, intended it to apply to the existing state of law regulating lia-

bility of common carriers and did not intend in any way to abrogate or modify the common law presumption of absolute negligence applicable to the state of facts proved in the case at bar.

We therefore believe that this record does present a case which brings the Respondent within the final proviso of the First Cummins Amendment, and that it was not necessary to give notice to the carrier of the claim herein asserted within four months after delivery of shipment in question.

It is respectfully submitted that the final judgment of the Supreme Court of Appeals of West Virginia in this case should be affirmed.

HENRY SIMMS,
LEWIS A. STAKER,
Counsel for Respondent.

December 21, 1925.

SUPREME COURT OF THE UNITED STATES.

No. 178.—October Term, 1925.

The Chesapeake & Ohio Railway Company, Petitioner, *vs.* The A. F. Thompson Manufacturing Company.	On Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia.

[March 8, 1926.]

Mr. Justice Stone delivered the opinion of the Court.

The respondent, a corporation, brought suit in the Circuit Court of Cabell County, West Virginia, to recover from petitioner, a common carrier, for damage to an interstate shipment of goods. The case was twice tried. See *Thompson Manufacturing Co.* v. *Railroad*, 93 W. Va. 3. The second trial before a jury resulted in a judgment for the respondent, which was affirmed by the Supreme Court of Appeals of West Virginia, 99 W. Va. 670. This court granted certiorari, 268 U. S. —. Jud. Code, § 237.

Petitioner supplied respondent, at its request, with two box cars for the transportation of a quantity of sheet iron gas stoves in car load lots from Huntington, West Virginia to Kansas City, Missouri. The stoves were shipped by respondent in good condition on interstate bills of lading purporting to exempt the carrier from liability unless claims for damage "be made in writing to the carrier within four months after delivery of the property." Upon arrival many of the stoves were found to be damaged by rust and unsalable. Respondent brought the present suit more than four months after the delivery of the stoves, setting up in its amended declaration that the damage was caused by the negligent conduct of the petitioner. At the trial the respondent made no attempt to show compliance with the requirement of the bill of lading for written notice of its claim to the carrier, and relied wholly on proof of the delivery of the stoves to the carrier in good condition and the delivery by the carrier at destination in a

damaged condition, to establish its right to recover. Petitioner proved that the cars supplied were in weather-tight condition; that after the goods were loaded on the cars they were sealed at the point of shipment, and that they arrived at destination in the same weather-tight condition, with seals unbroken.

The case turns on the meaning and application, in the circumstances, of the last proviso of the so-called Cummins Amendment, Act of March 4, 1915, 38 Stat. 1196, 1197, c. 176, amending the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended by § 7 of the Act of June 29, 1906, c. 3591, 34 Stat. 584, 593. The last two provisos of the Act, as construed in *Barrett* v. *Van Pelt*, 268 U. S. 85, read as follows:

"Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

If respondent does not bring the case within the terms of the final proviso, its failure to give written notice of claim will bar it from recovery. See *Georgia, Florida & Alabama Ry. Co.* v. *Blish Co.*, 241 U. S. 190; *Barrett* v. *Van Pelt, supra; Davis* v. *Roper Lumber Co.*, 269 U. S. —.

It was argued by petitioner in the state court as it argues here, that as respondent offered no direct evidence that the damage to the goods in transit was caused by negligence of petitioner, respondent did not show compliance with the requirements of the Cummins Amendment for relieving the shipper from the necessity of filing its claim in writing with the carrier. On the other hand, it is argued by the respondent that every carrier receiving goods for carriage in good condition, and returning them in bad condition, is conclusively presumed to have been negligent and is liable for the damage resulting from its negligence, unless the injury was caused by the act of God, the public enemy, or the act of the shipper or the nature of the goods themselves; that as the evidence and the verdict of the jury established that the damage was not due to any

of these causes, the carrier's negligence was to be conclusively presumed, and no notice of claim was necessary under the provisions of the Cummins Amendment.

It is sometimes said that the basis of the carrier's liability for loss of goods or for their damage in transit is "presumed negligence". *Hall & Long* v. *Railroad Companies,* 13 Wall. 367, 372. But the so-called presumption is not a true presumption, since it cannot be rebutted, and the statement itself is only another way of stating the rule of substantive law that a carrier is liable for a failure to transport safely goods intrusted to its care, unless the loss or damage was due to one of the specified causes. See *Railroad Co.* v. *Reeves,* 10 Wall. 176, 189; *Railroad Co.* v. *Lockwood,* 7 Wall. 357, 376; *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174, 181.

We do not consider that the phrase "carelessness or negligence" of the carrier, as used in the Cummins Amendment in exempting shippers from giving written notice of a claim for damage, has any reference to the conclusive "presumption" to which we have referred. If such were the meaning of the statute, every case of carrier's liability for damage in transit would be a case of presumed negligence, and proof of written notice of claim for damage required by the bill of lading would always be dispensed with, and the plain purpose of the amendment would be defeated. We think that by the use of the words "carelessness or negligence" it was intended to relieve the shipper from the necessity of making written proof of claim when, and only when the damage was due to the carrier's actual negligent conduct, and that by carelessness or negligence is meant not a rule of liability without fault, but negligence in fact. See *Barrett* v. *Van Pelt, supra.*

There is no language in the statute from which a purpose may be inferred to vary or limit the common law rules governing proof of negligence as a fact in issue, and the shipper may follow these rules when he seeks to show that no notice of claim was necessary.

The respondent therefore had the burden of proving the carrier's negligence as one of the facts essential to recovery. When he introduced evidence to show delivery of the shipment to the carrier in good condition and its delivery to the consignee in bad condition, the petitioner became subject to the rule applicable to all bailees, that such evidence makes out a *prima facie* case of negligence. *Miles* v.

International Hotel Co., 289 Ill. 320; *Miller* v. *Miloslowsky*, 153 Ia. 135; *Dinsmore* v. *Abbott*, 89 Me. 373; *Railroad Co.* v. *Hughes*, 94 Miss. 242, 246; *Hildebrand* v. *Carroll*, 106 Wis. 324. The effect of the respondent's evidence was, we think, to make a *prima facie* case for the jury. See *Sweeney* v. *Irving*, 228 U. S. 233; *Haines* v. *Shapiro*, 168 N. C. 34, 35; *Sims* v. *Roy*, 4 App. D. C. 496, 499. But even if this "*prima facie* case" be regarded as sufficient, in the absence of rebutting evidence to entitle the plaintiff to a verdict (*Bushwell* v. *Fuller*, 89 Me. 600, 602, 603; *Cogdell* v. *Railroad*, 132 N. C. 852), the trial court erred here in deciding the issue of negligence in favor of the plaintiff as a matter of law. For the petitioner introduced evidence of the condition of the cars from the time of shipment to the time of arrival, which persuasively tended to exclude the possibility of negligence.

The trial court properly submitted to the jury the question whether the damage was due to an act of God or the public enemy or to the inherent condition of the stoves, since upon the answer to it depended the liability of the carrier provided the shipper was entitled, under the Cummins Amendment, to maintain suit without giving the stipulated notice. But the court erroneously instructed the jury that if they found that the damage was not due to these causes, they might return a verdict for the respondent, thus, in effect, resolving the issue of negligence in favor of the respondent.

The judgment must therefore be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 170 and 171.—October Term, 1925.

The Chesapeake & Ohio Railway Company, Petitioner, 170 *vs.* Westinghouse, Church, Kerr & Co., Inc. Andrew W. Mellon, Director General of Railroads, Petitioner, 171 *vs.* Westinghouse, Church, Kerr & Co., Inc.	On Writs of Certiorari to the Supreme Court of Appeals of the State of Virginia.

[March 1, 1926.]

Mr. Justice Brandeis delivered the opinion of the Court.

These actions were brought in a state court of Virginia to recover amounts alleged to be due for the use of an engine and crew rented or assigned by the Chesapeake & Ohio Railway Company to Westinghouse, Church, Kerr & Co., Inc., under a contract made in September, 1917. The latter corporation was engaged in construction work for the Government on premises at Newport News connected by industrial tracks with the Railway's main line. Owing to war conditions, there was then serious congestion of traffic at Newport News, and the Railway failed duly to perform spotting service for the company. To remedy this condition the engine and crew were assigned to the exclusive use of its traffic, payment to be made therefor as prescribed in the contract. The use continued from that date until April, 1918. The Railway sued for the period prior to December 28, 1917; the Director General for that later. The defences were want of consideration and that the contract was void because it violated the Interstate Commerce Act and a similar law of the State. A judgment for the defendant, entered in each case by the trial court, was affirmed by the Supreme Court of Appeals on the ground of want of consideration. 138 Va. 647. This Court granted writs of certiorari. 266 U. S. 598. No question under the state law is before us.

The service of spotting cars was included in the line haul charge under both interstate and state tariffs. The Railway contends that under the tariffs no obligation rested upon the carrier either to furnish spotting service solely for the convenience of a shipper or to furnish him special facilities to meet abnormal and unprecedented conditions; that the contract was, therefore, not without consideration; and that, being for rental of equipment, it was not for a common carrier service and, hence, a contract therefor was legal under the Interstate Commerce Act, although no tariff provided for the charges. The service by special engine and crew contracted for and given was not spotting solely for the convenience of the shipper. It was the spotting service covered by the tariff. Compare *Car Spotting Charges,* 34 I. C. C. 609; *Downey Shipbuilding Corp.* v. *Staten Island Rapid Transit Ry. Co.,* 60 I. C. C. 543. It is true that abnormal conditions may relieve a carrier from liability for failure to perform the usual transportation services, but they do not justify an extra charge for performing them. The carrier is here seeking compensation in excess of the tariff rate for having performed a service covered by the tariff. This is expressly prohibited by the Interstate Commerce Act, Act of February 4, 1887, c. 104, § 6(7), 24 Stat. 379, 381, as amended. A contract to pay this additional amount is both without consideration and illegal. It is no answer that by virtue of the contract the shipper secured the assurance of due performance of a transportation service which otherwise might not have been promptly rendered; that ordinarily rental of engine and crew is not a common carrier service; and that such rental may be charged without filing a tariff providing therefor. Compare *Chicago, Rock Island & Pacific Ry. Co.* v. *Maucher,* 248 U. S. 359. To so assure performance to a shipper was an undue preference. Hence the contract would be equally void for illegality on this ground. *Davis* v. *Cornwell,* 264 U. S. 560.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.